University of Alberta

Managing Death: Diagnosing the "New" Eugenics in Canadian Legal Discourses and Narratives of Disability

by

Sally Kerry Hayward

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Abstract

Managing Death: Diagnosing the "New" Eugenics in Canadian Legal Discourses and Narratives of Disability, examines how three twentieth-century Canadian legal cases—Henry Morgentaler, Sue Rodriguez, and Robert Latimer—inform and problematize Canada's concept of itself as a liberal, tolerant, and progressive nation. Compromising Canada's constitutional endorsement of an emancipatory, multicultural pluralism that attempts to support *all* differences, these legal discourses reveal an antagonistic, if not an imminently violent, politics that has potentially dire consequences for those who exist outside of the legally-defined norm.

Chapter one, "The Canadian Abortion Controversy and The Canadian Charter of Rights and Freedoms," examines Henry Morgentaler's crusade to legalize abortion, and its particular manifestation in the 1970s democratic fight for equality and individual "human" rights. Within this context, Morgentaler's agenda to eliminate "unfit" subjects before they are born provides a barometer for assessing what forms of humanity are or are not viable. These life-and death-giving judgments have relevance not only for "unwanted" foetuses, but also for aged, ill, and working-class women, and for people with disabilities, in particular. Chapter two, "Assisted Suicide and Euthanasia: The Sue Rodriguez Case and The Special Senate Debate," argues that although Rodriguez had a right, as a rational citizen, to choose suicide, this choice becomes problematic when it is coerced by a politicised, corporate-driven ethics that values the rational, self-determined and autonomous citizen or when it is made on behalf of non-rational or disabled human beings. These two cases culminate in chapter three, "Compassionate Act[s] of

Kindness"? Mercy Killing and the Robert Latimer Case," which highlights the potential consequences of these liberatory politics and practices to people with disabilities. The court transcripts that pertain to the "mercy killing" of Latimer's twelve-year-old severely disabled daughter justify this killing through a constructed and stereotypical negation of Tracy Latimer's life. Figured in these narratives as inferior, even inhuman, Tracy is assumed to have a life that is "not worth living." By forcing a consideration of the ethics of a legal and public debate that uses a rights and responsibilities rhetoric to argue that certain individuals are "better off dead," the Latimer case raises questions that force a reconsideration of Canada and its concept of itself as a pluralist, liberal, and tolerant nation.

Ultimately, "Managing Death" argues that the "normal" modern materialist utopia envisioned by a liberal, democratic, and capitalist ideology, concerned as it is with progress and the perfectibility of "man," is achieved, paradoxically, by an underlying increasingly dystopian dependence on the administrative management of certain "required" deaths. What is at stake for people with disabilities is not only an increasing marginalization, as abstract notions of acceptable "normal" identities become reified in practice, but also an increasing acceptance of what Wolf Wolfensburger refers to as "deathmaking practices" or the "real life practice of eugenics:" the elimination from our imaginative and practical vision of those who exceed or challenge the norm.

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Dedication

For Jordan, whose courage, determination, and persistence in the face of overwhelming challenges continue to inspire me.

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Introduction

This project examines how the narratives of assisted suicide and euthanasia, embedded as they are in liberal, democratic, and progressive ideologies, construct Canada as a nation, and inform who Canadians are as a people. Raising some troublesome questions about the place of life and death in modernity, it considers how these issues of abortion and euthanasia—as figured in relation to the legal cases of Henry Morgentaler, Sue Rodriguez, and Robert Latimer—construct and manage the individual's orientation to the political order. Providing an arena for individual empowerment by establishing abortion and euthanasia as locations for certain forms of self-government, regulation, and responsibility, these cases provide inadvertently the ideological and the legal support for what Wolf Wolfensburger calls "deathmaking practices" (10): practices that participate in the imaginative and actual elimination of those who exceed or challenge the norm.

My focus for reading these narratives is based on the premise that the legal and constitutional story is the central and "official" story that defines who we are or who we want to be as a nation. Because this basic premise assumes that the nation is first and foremost an "imaginary" construct, a fiction, an analysis of its construction in the well-wrought narratives of law—in the trial courts, in the appeal courts and in the judicial decisions—is informative potentially of how this fiction is created, maintained, and developed in a largely unconscious way to prioritise and order people, events and experiences into a coherent, ideological whole. Covering a period that extends from the early sixties to the late nineties, the Morgentaler, Rodriguez and Latimer legal narratives expose the rules, conventions, norms and fictions that make the nation as a community

possible. Illustrating a systematic and systemic representational and literal structure that extends beyond the realm of law to reach into all avenues of public and private experience, these narratives affirm an able-bodied and able-minded citizenship, while disaffirming or positioning as abnormal or inferior dis-abled or non-normative individuals.

In other words, in that the law informs and is informed by other institutions, discourses, and practices, and in that it works within a scientific (i.e. medical) and secular framework to impart knowledge and a particular able-bodied or normative perspective that is in keeping with the liberal-democratic ethos of our time, it functions as an ideological and disciplinary support for existing social structures and for a normative model of human personhood that best supports these structures. Providing these structures and this model of personhood with the appearance of legitimacy and inevitability, the law establishes legal truths as a neutral solution to moral problems, assuming that moral behaviour is a matter of rule following, and that moral relationships are determined by duties, rights, and rules. These hegemonic and normative assumptions become problematic, however, when one realizes that the law, although pertaining to a certain neutrality, and although relying on conventional interpretations that pertain to reason, fact, and objective truth, works ultimately to reinforce, through the implementation of rhetorical strategies and fictions, dominant relations and knowledge formations.

Indeed, as Robert Cover argues, the law's tendency to structure events and subjects according to conventional or normative cultural classifications enables the establishment of what he calls a "normative universe" (95). In this universe, the law

"constantly create[s] and maintain[s] a world of right and wrong, of lawful and unlawful, of valid and void" (95). This internalised and institutionalised legitimation of a culturally-shared reality, as seen in the rules, regulations, and language of law, not only justifies and reproduces the normative situation and subject, "distributing the living in the domain of value and utility" (Foucault *History of Sexuality* 144), but also establishes the non-normative subject as its antithesis.

Specifically, while my analysis of the Morgentaler, Rodriguez and Latimer legal cases exposes the way in which the law, and legal discourse in particular, constructs and evaluates truth, knowledge and reality in ways that "[limit] our comprehension" of people, and "of the social world and its possibilities," it also calls into question the received concept of Canada as a liberal and democratic nation (Gabel 262). In performing this analysis, I argue that these cases indicate first, that there is a gap between the constitutional framing of the concepts of equality, liberty, and justice and their contemporary articulation and interpretation in the courts of law; second, that the concept of humanity, and the human person in particular, is being transformed from its democratic, individualistic and rights-bearing ideal to its status in contemporary corporate capitalism as a disposable commodity; and third, that this contemporary framing and transformation makes it easy to imagine and legislate not only that certain people are "better off dead," but also that "one has the right to kill those [monstrosities] who [represent] a kind of biological danger to others" (Foucault, *History of Sexuality* 138).

In Alasdair MacIntyre's terms, this movement towards legalizing assisted suicide and euthanasia is indicative of an epistemological crisis that occurs when traditional

cultural, political, and social meanings are challenged by new concepts and theories that demand a radical rethinking and/or revision of the past (*Whose Justice?* 362). In relation to the contemporary discourse and practice of assisted suicide and euthanasia, it is possible to argue that this crisis is located not only in a culturally and historically situated shift from a religious to a scientific perspective, but also in the epistemological conjunction between the traditional, conservative or democratic conception of equal rights and freedoms, as defined in the *Canadian Charter of Rights and Freedoms*, and its focus on the sanctity of life, and the concept of rights and freedoms, as defined in the political policies and practices of a democratic-liberal society informed by radical individualism and corporate capitalism, and its focus on the quality of life.

This shift in perspective that these cases imply suggests not only that the liberal-democratic ethos that informs Canada and the Canadian people is changing to encompass a focus on contemporary corporate capitalism, but that it might be changing to encompass, within its ideological tenets, what Thomas Hobbes called a "war-of all against all" (qtd in Foucault, "Society Must Be Defended" 63).[1] This is not a war in the traditional sense, but a war in an analogous sense, "by which each [individual] measures the danger that each [other individual] represents for him, estimates the others' will to fight, and calculates the risk he himself would be taking if he resorted to force" (Foucault 63). It is a "nonwar," fought from within the physical and psychological borders of Canada itself, that works in tandem with social and economic institutions to "[found] the State and [give] it its form" (63). While some of these battles might be productive, as in

[1] Thomas Hobbes, a seventeenth-century British philosopher, believed that the purpose of law should be to establish peace. Because human beings are "naturally" predisposed to war—stemming from the notion that every man is against every man in his competitive pursuit for possessions and power—the law has to impose its rules, regulations and constraints upon individuals to prevent anarchy.

the fight to recognize women's rights, others might, in the general trend to celebrate able-bodied, functional and progressive citizenship, use what Michel Foucault calls "techniques of power" in a reductive sense to exclude from the Canadian population some of its less functional or less able members (*History of Sexuality* 109).

In an attempt to explore what is at stake for non-normative people, and for people with disabilities in particular, I focus, in chapter one, on the Canadian abortion controversy, and its problematic relationship to the central tenets of equality and liberty, as outlined in the *Canadian Charter of Rights and Freedoms,* and as elaborated on in the 1988 Morgentaler Supreme Court Decision.

While acknowledging that Henry Morgentaler's fight to legalize abortion was both fundamental and essential to the development of women's rights and to the establishment of an equality rights-based concept of individual justice in Canada, I recognize that this debate establishes also a barometer for assessing what "rational" humanity is, when it begins, and what forms of humanity should or should not be valued and allowed to live. In the 1988 Morgentaler Supreme Court Decision, and in the discourses surrounding this decision, the rational attempt to define what is and what is not human results in a binary division that not only establishes an antithetical and hierarchical relationship between a woman and her foetus, but also between traditional, middle-class, family-centred, "rational" women and non-traditional, single, poor or unreasoned women, between foetuses who have the potential to perpetuate the middle-class social norm and those who could potentially, later in life, disturb the "normal" social order, between old and young women, able-bodied and dis-abled individuals, and between healthy individuals and those individuals who are suffering from illness or pain.

Challenging the constitutional tenets of the Charter, these binary relationships suggest that the purpose of the law is not to rule out the unequal treatment of individuals, but to map out the possibilities for equal citizenship, establishing who is more or less equal, as that equality is defined by a normative concept of human personhood.

While this ambiguous notion of equality might seem antithetical to Charter mandates, and section 15 in particular,[2] it is important to realize that these mandates depend, at least in part, on the ability of the law to apply a universal standard by which the law can mediate its judgments. In this respect, it might be argued that the Charter's use of the pronouns, "Everyone" and "all," while speaking to the desire and the obligation of the state to "give equal consideration to the interests of *every* citizen," is always-already defined by an original, a priori consensual understanding of human personhood. In law, the concept of a "person" is defined as an individual who, through virtue of his or her age and performance, has "certain legal rights and responsibilities" (Yogis 202). This concept cannot be divorced in law from the definition of the person as citizen: a person who, as John A. Yogis defines, possesses civil rights and liberties, as dictated in the Charter's identification of "democratic rights and freedoms that govern the relationship between the individual and the institutions—whether social, political, or economic—of society" (47).

While these legal definitions would not apply to all individuals—for instance, foetuses, children and cognitively-disabled adults—they form the normative measurement by which all individuals might identify themselves and be identified.

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[2] Section 15 (1) of the *Charter of Rights and Freedoms* reads, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Constructed in the language of Henry Morgentaler's pro-choice rhetoric and narrative, this focus on equal human personhood supports women's right to control their own sexual reproduction. From this pro-choice perspective, the issue is not about the equal rights of the foetus, but about establishing the equal rights and liberties of women to own their own bodies.[3]

According to Chantal Mouffe, this Janus-faced commitment to both liberty and equality constitutes the central paradox in liberal-democratic thought. Because liberalism refuses the unequal treatment of individuals on the basis of religion, race, class, gender, and disability, and because the democratic project perpetuates the belief that the state should give equal consideration to all of its citizens, there is, when competing interests and agendas are involved, an inevitable discrimination against some individuals.

Readdressing and realigning the Canadian national consciousness, the abortion debate—as it manifests in the seventies and eighties—speaks to this paradoxical relationship between competing notions of liberty and equality. Pointing both to the liberty of women and the general liberty of individuals from state or institutional control, and, paradoxically, to new strategies and techniques of containment that position certain women and certain non-normative individuals as inferior, the abortion debate provides a prominent and controversial forum for considering the impossibility of establishing a free and equal citizenship. In practice, the liberty for women is achieved by constructing certain women and certain non-normative individuals as inferior. Limiting or restricting

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[3] Conversely, Joe Borowski's pro-life perspective supports the rights of foetuses, who, as "natural persons," have the potential to become reasonable, autonomous, rights-bearing individuals. Ironically, both of these perspectives effect a rhetorical and actual violence on their opposing counterparts: women's equality and liberty are constrained by the pro-life position which would force them to bear children they do not want, and the foetuses' equality and liberty are constrained by the pro-choice faction who demand their lives.

the lives and choices of "unequal" working class, aged, ill, single or disabled women, who, from Morgentaler's pro-choice perspective, have a duty to abort their children, calls the concept of equality into question. Because this concept of equality is constrained within a "normal" rubric that dictates the relationship between "unequals," it can only hold out a promise of equality and freedom, as dictated by a "normal," middle-class and, I would argue, patriarchal vision.

Moreover, my concern is that while denying the foetus the rights of legal personhood does ensure that women have the right to medically safe abortions, it does so at the risk of establishing a philosophical and practical ethics that privileges certain lives over others, arguing that some lives are not worth living.[4] Consequently, there is a risk that this refusal of personhood might be extended to other "unwhole" human beings, however that term is defined, and that this extension might, to the extent that it begins to form a grand narrative that has its precedents in earlier eugenics practices, have potentially dire consequences for those considered non-normal or disabled. This normative narrative, which often translates into unequal or discriminatory treatment, has implications for the nation-building concepts of "equality," "liberty," and "justice," as they are embedded in the *Canadian Charter of Rights and Freedoms,* and as they are interpreted and framed inside and outside the courts of law.[5]

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[4] The German term, used in the Nazi euthanasia program in the late 1930s, was " 'lenensunwerten Leben': life unworthy of life" (Humphry).

[5] Here I am not only talking about how these debates are framed in and by public opinion that exists outside of the restrictions, rules, and regulations of the law, but how they are framed by the court's and parliament's refusal to establish a law, which enables practices to go on *as if* there is a law. In other words, the practice of abortion exists not in spite of having a law, but because neither parliament nor the courts have established a law on abortion in Canada. This tendency of the law and of government to renege on their responsibilities when confronted with difficult issues is a sign of a larger political war: a struggle that uses the Charter and the individual autonomy of Canadian citizens to debate the future form of political control in Canada. This debate is based on which form of control is most effective: a restrictive or less restrictive status quo.

In a similar way, chapter two, which examines the 1993 *Rodriguez v. the Supreme Court of Canada* Decision and the 1994 *Special Senate Debate on Assisted Suicide and Euthanasia,* raises questions about the legalization of assisted suicide and euthanasia that are central to a contemporary understanding of "the constitutional make-up of our form of democratic government" (*Rodriguez v. B.C (SCC)* 1993).[6] Assisted suicide and euthanasia, as "threshold issues," not only call into question the role of government and the role of courts in balancing "the interest of the state and the individual," but they also problematize Canada's democratic attempt to maintain an image of itself as a tolerant, liberal nation-state.

Exposing the contradictions of this individual-community and nation-state project, the Sue Rodriguez case—the 1993 case involving the woman with Amyotrophic Lateral Sclerosis (ALS) who petitioned the courts for the legal right to commit suicide with the help of a physician—provides a focus for considering the ongoing nationwide debate about the potential legalization of euthanasia and assisted suicide (as typified by the 1994 Special Senate debate). This contentious debate illustrates how the democratic desire to maintain an inclusive, "equal" citizenship through a conservative obligation to uphold "long-standing [policies]" concerned to protect the "sanctity of life," is increasingly in conflict with a new liberal awareness that the "fundamental values at play in our society are changing" to endorse policies, practices, and ethics that are concerned, rather, to protect the "quality of life."

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[6] The word euthanasia simply means "good death"—originating from the Greek "eu," meaning "well," and "thanatos," meaning death—but has come to mean causing death with intent, whether by doing something to cause the death of a person (active euthanasia), or by omitting or withdrawing treatment that is prolonging the dying of a person (passive euthanasia). Euphemisms of the pro-euthanasia movement include "right to die", and "death with dignity". Assisted suicide is a related term in that it implies a deliberate and voluntary hastening of death that is assisted by a doctor, or, in some cases, by a family member or other individual. Although suicide is legal in Canada, assisted suicide is not.

While the sanctity-of-life perspective is often associated with outdated religious ideals that are not in keeping with contemporary scientific secular views, many individuals see the sanctity-of-life perspective as the only alternative to a rampant individualism and a competitive corporate capitalism that assumes anarchistically that value is relative, and nothing and no one has any intrinsic value. To echo Justice Sopinka's deference to Ronald Dworkin, from a sanctity-of-life perspective,

> [t]he hallmark of the sacred as distinct from the incrementally valuable is that the sacred is intrinsically valuable because—and therefore only once—it exists. It is inviolable because of what it represents or embodies. It is not important that there be more people. But once a human life has begun, it is very important that it flourish and not be wasted. . . . Something is sacred or inviolable when its deliberate destruction would dishonour what ought to be honoured. ("What is Sacred" 162)

The original premise that all human life is sacred in and of itself is the overarching and, according to Sopinka, the necessary focus of the majority decision in Rodriguez. Cautioning against the self-interested individual who might persuade other more vulnerable people to commit suicide, Sopinka stresses that because "there is a consensus . . . human life must be respected[,] . . . [and] we must be careful not to undermine the institutions that protect it" (*Rodriguez v. B.C (SCC) 1993*). In an attempt to maintain this institutional authority, Sopinka's solution, "[g]iven the concerns about abuse" and "the great difficulty in creating appropriate safeguards to prevent abuse," is to maintain a "blanket prohibition on assisted suicide."

Justice Sopinka's assumption, however, that the prohibition on assisted suicide is

reflective of "the fundamental [value] at play in our society" to protect all human life, does not account for the way in which this fundamental value, and the resulting emphasis on protection, ultimately endorses a paternalistic state politics that limits the freedom and autonomy of individuals in an attempt to keep them free from harm.[7] Neither does it account for the way in which paternalistic policies and practices de-legitimate certain individuals, taking away their rights and liberties by using coercive incentives and demands that disrespect their autonomy, deciding for them against their will, what might be the best course of action.[8]

In one respect, then, the implementation of a state-endorsed, institutionally constructed and regulated paternalism to protect individuals who, unlike Rodriguez, are not capable of making their own rational choices, and might be subject to, as Sopinka argued, being "induced in moments of weakness to commit suicide," might seem a responsible choice. In another respect, however, this paternalism disempowers the individual or the individual patient by opening up the possibility of institutional intervention and by enabling institutional agents, such as doctors, to affirm that radical forms of treatment and/or institutionalisation might be in the patient's best interests. In extreme cases, this might even involve switching off life support, justifiable, if, in the doctor's and the family's opinion, death is the lesser harm.[9]

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[7] Paternalism comes from the Latin, "pater," meaning to act like a father. In modern philosophy and legal jurisprudence it means to act for the good of another person without that person's consent. Paternalistic policies can range from demanding that individuals wear seatbelts or motorcycle helmets to demanding that individuals deemed to be non-competent should be institutionalised.

[8] The restriction of women's interests and freedoms were central to the Morgentaler case that wanted to eliminate the state's interest in the relationship that women have with their own bodies and their own reproduction.

[9] This institutionalised oppression, which denies individuals their liberty and equality, has resulted in the wrongful incarceration, the sterilization, and the lobotomisation of individuals. In Nazi Germany, the program to exterminate "incurables" or people with disabilities was the first phase in the extermination of

The interpretation of and engagement with some of these issues in legal and public arenas indicates that there is at this present time a movement away from the democratic concern to protect the equal rights and equal liberties of *all* people to a movement that desires to protect the equal rights and equal liberties of *all* rational, self-interested, self-determined citizens: those able to internalize a neoliberal ethics—a liberal ethics that is influenced by the values and demands of corporate capitalism—and techne to their own lives. The Sue Rodriguez case is pertinent to this consideration because it raises questions about equality and liberty, as they relate to liberal-democratic rule and its contextualization in paternalistic policies and practices most suited to a contemporary corporate capitalism. Specifically, I argue that paternalistic practices, which empower institutions and institutional agents, transform under corporate demands to empower the individual. In this situation, the individual is encouraged to choose unconsciously what the state, now influenced by corporate capitalist morals and ethics, wants. It is precisely to the extent to which Rodriguez, as a rational, self-determined citizen, was able to internalise the utilitarian corporate values of the contemporary (neo)liberal-democratic ideology that she was able to fight for her "equal" right to receive help to commit suicide when she could no longer do it herself.

In other words, Sue Rodriguez is evidence of the liberal-democratic desire, compounded by the economic demands of corporate capitalism, to govern not only institutions and practices, but also individuals and their discourses, actions, bodies, lives, and deaths. From this perspective, the liberal individual, like the liberal state, is well-regulated. He or she has internalised a language and a national narrative that is not neutral

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Jews and other "undesirables" in the death camps. There were an estimated 275,000 people with disabilities killed in this precursor to Hitler's larger extermination project (Sobsey 19).

or natural, but based on hegemonic power relations and a desire to maintain them "as they are." Contained within this normative interpretive framework, this individual is self-governed only to the extent that his or her autonomous self-determination is compliant and passive; similarly, he or she is successful only to the extent that his or her given idealization of progress is tempered by an individual will that is stable, efficient, and useful, having internalised the concept of neutrality, and mistaking it for a form of docility (Foucault *History of Sexuality* 139).

Rodriguez' choice, as a "good" subject, to commit suicide can be seen not as a radical rebellion against institutions or as a feminist assertion of her own right to control her own body, but as a compliant acknowledgment that, given her incapacitating physical disability, her life was no longer worth living. Encouraged by institutional agents, such as doctors, lawyers, and leading members of the Right to Die Society, Rodriguez, who felt she could not compete as a useful, functional citizen in a competitive marketplace, chose what she believed was the only rational and progressive option open to her. In this respect, her choice to deliver herself to death becomes the ultimate neoliberal choice: the ultimate affirmation that a "life deprived of quality [is] a life not worth living" (Rodriguez qtd in Hobbs Birnie 37). In this way, Rodriguez proves to those she loves and the world in general that she has the neoliberal attributes of an autonomous, independent individual: she is self-sufficient and self-regulating in the extreme, controlling not only her own life, but also the timing and manner of her own death.[10]

In short, even though Rodriguez is unable to choose the conditions of her own life—that is, unable to obtain the necessary conditions and resources to enjoy her

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[10] Rodriguez reiterated this sentiment when she asked, "If I cannot give consent to my own death, then whose body is this? Who owns my life?" (qtd in Enns 50).

individual liberty—she is free, paradoxically, as a rational individual, a moral agent, to assert her liberty and equality in choosing her own death. Indeed, the tenets of neoliberalism, compounded by economic concerns about the welfare state and the health care system, demand it. Having conformed to the neoliberal notion that her non-utilitarian and hopelessly dependent life required her death, indeed that she would be "better off dead," Rodriguez ironically reveals that in a neoliberal democracy, the other side of the life-affirming ideology and its idealization of autonomous, choosing individuals is the death-affirming ideology and its demand for the lives of those individuals who function in the system only as "disposable commodities."[11]

This is not to say that this idealization of suicide as a form of "self-deliverance," a way of delivering oneself from a "death without dignity," necessarily implies that the only alternative is a return to conservative democratic ideals that insist on the sanctity of all lives. This dichotomous alternative, as my analysis of the Supreme Court Rodriguez decision shows, has problems of its own. Indeed, the paternalistic programs and policies that a sanctity-of-life politics generate provide their own version of authoritarian oppression and can be seen to foreshadow and provide the basis for the negation of difference and diversity that is exemplified in the quality-of-life corporate politics.

For Chantal Mouffe, the solution to these kinds of contentious issues is to acknowledge, paradoxically, that there is no solution. The attempt, by political theorists such as John Rawls, to find a "rational resolution" or consensus on these issues does not,

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[11] Speaking of what they see as a troublesome modern relationship between life and death, Rabinow and Rose question the ability of the contemporary "'dream of power'," which "focuses on the pole of life" (bio-politics) to answer some of the troublesome questions about the place of death in the twenty-first century. Highlighting issues such as "selective abortion, selective foetal implantation, euthanasia, brain death, and the end of life" issues, they suggest that "one of the most compelling intellectual challenges for our present is certainly to develop an analytics that brings questions of the administration of life and death into a relationship" (xxx).

in Mouffe's terms, account for the way in which a consensus creates an allegiance to certain types of democratic institutions, practices, and citizens (95). Because relations of power are fundamental to modern liberal democratic rule, "conflict and division . . . cannot be completely eliminated (33). Keeping the debate agonistically open—that is transforming the debate, so that it is no longer between antagonistic enemies, but between adversaries, and no longer grounded in abstract rationalities, but in lived practices or "conditions of existence," (96)—is, for Mouffe, the best way of acknowledging "the tension between [liberal democratic] constitutive elements" and the best way "to harness it in a productive way" (9). By "multiplying the institutions, the discourses, the forms of life that foster identification with democratic values" (96), the dream of a rational consensus is replaced with a dream of open democratic contestation or "undecidability," which is, for Mouffe, the "very condition of possibility of decision and therefore of freedom and pluralism" (34).

While Mouffe's model problematizes the liberal-democratic attempt to create a neutral rational consensus, it does not fully account for the way in which the authority of the law rests upon its ability to make decisions, and on the way in which these decisions, informing as they do the very foundations of liberal-democratic rule, privilege the rational subject. Although she does argue that an *a priori* privileging of rationality creates a "conception of the subject which sees individuals as prior to society, bearers of natural rights, and either utility maximizing agents or rational subjects" (95), she does not fully explore the aprioristic privileging of the rational subject in the lived practices and debates to which she gestures. In my view, a materialistic analysis, which attempts to seriously look at the lived practices or "conditions of existence," demands a close analysis of how a

contemporary liberal-democratic antagonistic "us-them" politics values only specific practices and "specific forms of life" (97). The assumption of rational subjectivity, which is embedded in the basic tenets of the liberal-democratic practices of abortion and assisted-suicide, is essential to an understanding of how these debates position citizens as both free and unequal.

Because both a sanctity-of-life and a quality-of-life ethics base their morals and judgements on the assumption that the "reasonable person," [12] and his or her ability to use a reasoned and well-thought-out argument as a means to judge "truth," is the standard or norm to which all should aspire, the non-rational person, who does not have this ability or does not have it to the same extent, becomes non-standard and non-normal. Additionally, because this assumption of reasonable personhood is conflated with an assumption that the person in control is also able bodied, able to carry out paternalistic policies or able to contribute to a competitive corporate economy, the physically or cognitively dis-abled person is judged inferior. From this perspective, it is possible to see that the desire to keep conflict agonistically open, as Chantal Mouffe would suggest, is always-already foreclosed by the base assumption of rational able-bodied subjectivity that informs all debate, and by the basic assumption of inequality.

My concern, then, is not to attempt to resolve these issues, but rather to further open the debate by pointing to the complexity of some of its hidden assumptions, and by highlighting that, at base, this debate is always already foreclosed by its insistence on creating what constitutes an acceptable, rational able-bodied human personhood—one that is driven by self-interest and the demand to carefully, intelligently, and resourcefully

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[12] *The Canadian Law Dictionary* defined the "reasonable person" as "an imaginary person who possesses and uses the qualities of carefulness, intelligence and judgment that society requires of its members for the protection of their own interest and the interests of others" (Yogis 223).

judge one's own interests in relation to the interests of others—as a model for an acceptable Canadian citizenship.[13]

In chapter three, I highlight how the concepts of individual choice and liberty come together with the concept of paternalism to justify, in an irrational and emotional rhetoric that poses as rationality, the murder of vulnerable people, whose lives are considered "not worth living." Taking into consideration Mouffe's point that the rational perspective does not account for "the crucial role played by passions and affects in securing allegiance to democratic values" (95), I point out that the 1994 Robert Latimer case, and particularly the argument made by his defence lawyer, Mark Brayford, is based not so much on rational, antagonistic or agonistic conflict, but on the creation of rhetorical fictions, stories, narratives, and myths that position Tracy Latimer as inferior.

Central to the case, the 1994 Robert Latimer trial provides a focus for thinking about Robert Latimer's 1993 murder or "mercy killing" of his twelve-year-old, severely-disabled daughter, Tracy. In this trial, Mark Brayford, Latimer's defence attorney, claimed that Latimer killed his daughter because of her pain. Additionally, however, he attempted what Kent Roach calls a "novel defence:" the argument that Latimer had "the legal *right* to commit his daughter's "suicide" for her by virtue of her complete absence of physical and intellectual abilities" (my italics 477). It is this conflation of physical and mental disabilities, as well as Tracy Latimer's construction as a "pain filled bundle of needs," that provides a locus for rethinking how legal discourse and representation work at least in this case to suggest appropriate relations between individuals and between

[13] It is precisely this calculating and self-interested relationship to oneself and to others that worried Thomas Hobbes who, in the seventeenth century, predicted a competitive warfare between individuals that would be driven by competition, greed, and the egotism of individuals.

individuals and institutions that imagine the disabled as deviant and inferior, and, thus, "unacceptable" human beings.

A close reading of Latimer's confession and Brayford's arguments in this trial not only provide a basis for Judge Noble's 1997 constitutional exemption, and for the gesture towards implementing the Royal Prerogative of Mercy in the 2001 Supreme Court Decision, but they also, more specifically, reveal that the law privileges the choices of rational able-bodied individuals. Providing a framework for understanding Tracy's supposed physical and cognitive pain-filled existence, the confession and the 1994 trial favour paternalistic programs and attitudes that support and empower authoritarian institutional structures, such as the law, medicine, and the family, and authoritarian rational individuals, such as lawyers, doctors, and fathers, who can choose to eliminate those considered non-rational or non-normal.

In this case, Tracy Latimer was systematically reduced to classifications and abstractions that metaphorically and synecdochally refused her being in its totality. By literally putting Tracy's body on trial, Brayford was able to construct Tracy as, at worst, a complete absence, and at best, as a stereotype of helpless suffering and pain, a being, debatably human, who was unable in the conventional sense, to become a "normal," self-reliant and "useful" citizen, able to contribute to society. In doing this, Brayford presented his argument as an appeal to reason, when, in fact, it constituted a strategic emotional, if not fictional, appeal, designed to persuade the jurors, the judge, and the general public that Tracy was, indeed, "better off dead."

This attempt to construct Tracy as non-human, indicates that the legally-sanctioned story is one that privileges able-bodied ability. Within this scenario, those who

cannot be accurately or appropriately governed—those unable to qualify as liberal subjects, unable to "secure the conditions for an optimal but natural, and self-regulating functioning" (Burchell 127), or those who do not, for whatever reason, "[value], [develop], and [interiorise] an essentially political self-identity . . . think[ing], feel[ing], and affirm[ing] themselves as citizens" (120)—are devalued.

Defined by an "individualizing art of government" as "abnormal," the opposite of "natural-social man . . . normal man" (142), individuals such as Tracy Latimer who are considered ungovernable, become knowable through the politically "discursive mediation of our metaphors and visualizations"(51), and, as Michel Foucault argues, through "the setting-up of a complex institutional network that, within the limits of medicine and justice, serves as a 'reception' structure for abnormals and an instrument for society's defence" ("The Abnormals" 55). As a conceptual and "theoretical framework," this institutional network, when manifested in actual practices, enables the "social and moral justification, for all the techniques of identification, classification, and intervention applied to [abnormal]" or "inhuman" bodies in an attempt to negate, contain or even eliminate them from "normal" vision (55), and from what Robert Cover calls a "Nomos" or a "normative universe" (95).

An examination of how these legal narratives are constructed in terms of this conceptual framework of identification, classification, intervention, and possible elimination reveals that the promotion of ability and "normality," often couched in the language of individual rights, finds expression in relation to a "new" eugenics agenda that (re)constitutes information and knowledge about certain "types" of individuals anew, so as to reconfirm modernity's liberal democratic and corporate belief in progress, the

"perfectibility" of man, and the unpalatable and the disposable presence of degenerate "others."[14] Imagining this teleological "dividing line between persons and non-persons with regards to [liberalism's] core values" (23) positions the disabled, at best, as those deserving of charity, and at worst, as those whose lives are not worth living.[15]

This concept of a telos appears liberating because it appears to allude not so much to a fixed, graded organization as to an end, an aim or a fulfilment to which *every* individual person can aspire. However, because it is qualified by a liberal morality that presupposes the end as being a rationally-based economic conception of the good life, and because it argues that the "fulfilled or final state of human nature allows us to distinguish between character traits or behaviour patterns that do, and those that do not, contribute to the development and realization of that telos, and to regard the latter as 'bad' and the former as 'good'" (Mulhall and Swift 79), the telos ultimately encourages the individual to embody contemporary marketplace virtues, such as speed and efficiency, adaptability, drive, or a "willingness to work within established frameworks and tasks" (Galston 223). These virtues are not always easy or possible for people with physical or cognitive disabilities to aspire to, or, because of their disabilities, attain. Despite technological advances, and despite the growing business of rehabilitation practices, the disabled are often evidence that "training and education cannot overcome every obstacle" (McLaren 14), and that, democratically speaking, it might not be possible

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[14] In Canadian culture, eugenic principles and issues remain unexamined and unspoken. If questions about a 'new' eugenics are raised, they are inevitably assigned to the domain of science or, more specifically, to the domain of the genetic researcher, and couched within a debate about the value, to all humanity, of cure and prevention. I argue, however, that this "new" eugenics is not confined to the realm of science; it exists in practices and discourses that have significance precisely because they are not visibly constructed around a eugenics agenda, and because they are embedded in events and discussions that are endorsed by the majority of Canadians.

[15] See Lennard J. Davis' *Enforcing Normalcy* for a complete analysis of how this dividing line was established in relation to intelligence testing and the normative bell curve in the nineteenth century.

to secure equal opportunities for *all* citizens or to expect that *all* citizens are capable of realizing their own teleological ends.[16]

In this way, it is possible to argue that people with disabilities create an ethical and a moral vacuum for liberal-democratic theory and practice. Caught in between these often violent and violating adversarial, political positions, non-normative individuals are subjected to a regulatory scheme or form of governance that, paradoxically, in the name of reason, justice, goodness, equality, and liberation, endorses a consensual justification for the administration of certain "required" deaths. In this respect it is possible to see that Sue Rodriguez might be persuaded to consider that she has, as John Hardwig theorizes, a "duty to die" (*Is There a Duty to Die* 121),[17] that Henry Morgentaler might believe he has a duty to abort impaired foetuses who might, once born, strain the socio-economic system, and that Robert Latimer, once he had identified, classified and figured his daughter, Tracy, as a burden, a possession, and, ultimately, as a disposable object, might feel compelled as a responsible citizen, a subject with rights, to perform his duty as a father and put his daughter out of her misery.

In this dominant, hegemonic narrative, Morgentaler fought for his legal right to abort foetuses, and Rodriguez, who felt that her life had no purpose any longer, fought for the legal right to contract a doctor's services to help to kill her. Similarly, Tracy's

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[16] While critical of Alasdair MacIntyre's use of a telos to achieve democratic liberty, I do think his philosophy overall has potential for articulating a liberal theory of equality that is inclusive of people with disabilities. First, the basis of his communitarian liberal philosophy points in interesting ways to the crisis of modernity and the conditions for the exclusion of people with disabilities, and second, his concept of narrative unity holds out exciting possibilities for the inclusion of disabled people. See MacIntyre's *After Virtue* for a full account of the crisis of tradition and the concepts of practice and narrative unity.

[17] John Hardwig, a leading bioethicist and academic authority on these issues, illustrates the way in which this slippery slope is actually compelled by those in authority when he writes, "There can be a duty to die before one's illnesses would cause death, . . . In fact, there may be a fairly common responsibility to end one's life in the absence of any terminal illness at all. Finally, there can be a duty to die when one would prefer to live. Granted, many of the conditions that can generate a duty to die also seriously undermine the quality of life. Some would prefer not to live under such conditions. But even those who want to live can face a duty to die" (*Is There a Duty to Die* 121).

suffering, commodified to justify the values of a contemporary consumer culture that has no use for the dis-abled, non-functional body and mind, and for disabled people in general, can be read or imagined as a "contract" that her father has, not to nurture his daughter's life, but to kill her.

Because, in the legal atmosphere of the courts, discourses of and debates about assisted suicide and euthanasia are generally read as indicative of the antagonistic conflict between the sanctity-of-life perspective—endorsing equality for all and espousing conservative democratic values—and the quality-of-life perspective—endorsing equality for all rational individuals and espousing utilitarian, competitive, liberal corporate capitalist values—the attempt to establish a legal, unanimous consensus on this issue is thwarted by, as Melvin I. Urofsky argues, "thorny questions of human liberty and individual privacy, on the one hand, and the legitimate interests of the state in the health and welfare of its citizens, on the other" (x). Expressing concerns relevant to both the individual and the state, the issues of assisted suicide and euthanasia go beyond the microcosmic, individual decision-making context to a macrocosmic context that is concerned with how legal decisions and public attitudes reflect the "real political struggles" and power plays pertinent to the democratic values of participatory decision making and the liberal values of individual liberties and freedoms (Cover 24).

Acknowledging the need to focus on this larger context, my analysis does not attempt, then, to resolve the contemporaneous issues surrounding the philosophy and practice of euthanasia, but to consider how and why this debate has become one of the most contentious and one of the most significant debates of our time. The abortion debate, and the debates about assisted-suicide, euthanasia, and mercy killing, not only

reveal the nature of the epistemological and ideological shift in thinking from a democratic or a liberal-democratic zeitgeist to a culture dominated by a corporate ethics, but they expose a hypocrisy that needs to be accounted for if the theoretical and constitutionally inscribed notion of Canada as a liberal, tolerant, and pluralistic country is going to align itself with actual practices and experiences. While constitutional documents, legal decisions, and much of the rhetoric bandied around in the name of a liberal democratic Canada urges and enforces an ethical focus on equality, a close study of these practices, policies, and the rhetoric inherent in them, reveals that equality is consistently compromised by its binary opposite, inequality, and that liberty, understood in terms of an individual's freedom from state interference, can only be found for some people, paradoxically, in an acknowledgement of the non-normative individual's complete lack of subjectivity: in his or her death.

Although the scope of this work does not allow me to address potential solutions to this hierarchical and, in some cases, violent construction of human personhood, I do suggest some possible solutions in the conclusion. Although power relations are mystified and instrumentalized, "rooted deep in the social nexus," I agree with Foucault when he argues that resistance is possible (*History of Sexuality* 95). Once one understands the "relational character of power relations"—the idea that an able-bodied identity or view of personhood is inextricably at once independent of and dependent upon its ability to see itself in relation to disabled identity and to a network of all other relations of power (feminism and corporate capitalism, for example)—it is possible to imagine a "multiplicity of points of resistance" (95). Using the metaphor of warfare in a

similar way to Thomas Hobbes, as a form of political strategizing within a particular society (93), Foucault argues:

> there is a plurality of resistances, each of them a special case: resistances that are possible, necessary, improbable; others that are spontaneous, savage, solitary, concerted, rampant, or violent; still others that are quick to compromise, interested, or sacrificial; by definition, they can only exist in the strategic field of power relations. (*History of Sexuality* 96)

In relation to the specific type of discourse and narrative that appears in the debate about abortion, assisted-suicide and euthanasia, one might ask, at this specific socio-political point in time, how this particular conception of able-bodied and able-minded personhood speaks to traditional and emerging power relations.

How, for example, does this construction speak to the tension that exists between individual and institutional power, between feminist rights, children's rights, disability rights, and the rights of fathers and mothers on farms? How does it throw into question the equitable and just pluralistic vision of Canada, clearly outlined in the rights' discourse of the *Canadian Charter of Rights and Freedoms?* What does it tell us about the nature of Canadian justice, both at this present point in time and in the future? What does it tell us about the violence of law, language, and narrative as they translate into corporate, institutional and individual practices? How, in short, is this story "told" and, even more significantly, how is it "heard" and by whom? It is in asking and answering these questions that one is capable of seeing the "aims and objectives," and "tactics" employed by those in power. In recognizing the "cleavages" and "fractures" in the narratives and discourses of those in power, it is possible to "analyse the mechanisms of power"

(Foucault *History of Sexuality* 97), seeing, with eyes open wide, "the pattern of the modifications," the "distributions of power," and the "transitory points of [possible] resistance" (96).

The Canadian Abortion Controversy and *The Canadian Charter of Rights and Freedoms*

The abortion crusade, which ranged from the early 1960s until the late 1980s, has become a cultural phenomenon particular to Canada and its construction of itself as a liberal nation. If, as Benedict Anderson posits, the nation imagines itself as a community, a "deep, horizontal comradeship" or a "fraternity" that dreams of being free (7), then abortion as a social practice can be instructive of how the nation imagines its freedom, and how it manages those who would compromise this fraternity and its desire for freedom. By challenging the tensions, prevalent in the seventies and eighties, between traditional conservative values and liberal morality, between public policy and private conscience, and between questions of agency and "unequal" relations of power, the abortion debate, traditionally conceived, was able to readdress and realign the Canadian national consciousness in respect to women's rights, and, in particular, in respect to women's right to make decisions about their own bodies and reproductive choices.

In one respect, it is possible to say that the amendment of the abortion laws in 1969 and in 1988, when the abortion law was struck down as being unconstitutional because it infringes upon a woman's right to "life, liberty and security of the person" (*Canadian Charter of Rights and Freedoms*), indicated both a feminist victory and a more general liberation of individual autonomy from state or institutional control; in another respect, it is possible to see that the amendment of the abortion laws, which proceeded in tandem with the creation of the *Canadian Charter of Rights and Freedoms*, reflects a "new dimension in Canadian politics—the 'politics of rights'" (Morton 300). In

other words, the establishment of the Charter, which occurred concomitantly with the fight to legalize abortion, indicated a move from the old constitution—a constitution of governments, federalism and parliamentary debates conducted among "political elites"—to a new constitution, "concerned with individuals and their rights and freedoms" (299). This new forum allows "interest groups who 'lose' in the traditional arenas of electoral, legislative and administrative politics" a second chance (300). Particularly empowering those groups who might, by reason of their gender, ethnicity, and/or disability, be classed, in a discriminatory sense, as "non-territorial identities," this new politics of rights allows these groups to mobilize themselves, establishing "new networks and coalitions" and demanding for themselves the rights accorded to all Canadians.

The abortion debate, ironically contextualized in the Charter debate's "bloodless revolution," provided a forum for debating the rights of women and the rights of foetuses (11). In simple terms, on one side of the debate, the sanctity-of-life, pro-life activists argued that the foetus had the right to life; on the other side of the debate, the quality-of-life, pro-choice activists argued that the woman's right to choose a "good" life superseded the right of the foetus to life, however that is conceived. This debate was driven by feminist activists such as Judy Rebick and Norma Scarborough, united by their commitment to the Canadian Abortion Rights Action League (CARAL) and women's reproductive rights. Centre stage, however, were the conflicting political and moral agendas of what F. L. Morton calls two "unreasonable men" (16): Joe Borowski, who advocated for the rights of the fetus (pro-life),[1] and Henry Morgentaler, who advocated for the rights of women (pro-choice).

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[1] Joe Borowski, a former miner, Catholic, political activist, and Manitoba NDP Cabinet member, took up the pro-life crusade in the 1970s. Forming the pro-life group, Alliance against Abortion in 1973, he went on

Although this campaign began in the sixties, with both sides of the debate challenging the Canadian *Bill of Rights*, the adoption of the *Canadian Charter of Rights and Freedoms* in 1982, with its detailed outline of individual and group rights, provided both Borowski and Morgentaler with the opportunity to use the law, its newly conferred political power, to effect change in abortion policy.[2] Because the Charter bypassed parliamentary procedures, "explicitly authoriz[ing] judges to interpret and enforce the Charter of Rights, giving them the power to declare conflicting statutes void," both men believed that the Charter, although constitutionally neutral on the issue of abortion, would "serve as a catalyst for more aggressive judicial review of Canada's abortion law" (128-9).

However, although their respective campaigns are focused on women's right to autonomy and the right of the foetus to life, their participation went beyond the abortion question, to "irritate old wounds in the Canadian body politic: issues of West versus East, Protestant versus Catholic, English versus French, . . . Quebec versus Ottawa" and

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to organize a campaign of civil disobedience against the public funding of abortions by withholding his taxes, and, consequently, in 1975, he went to prison (the first of three times) for it. In 1981, Borowski, infuriated that the Charter in its formative stages, refused to include a right-to-life clause, went on a ninety-day hunger strike, which was only stopped by a personal order from the Vatican's emissary in Canada (Morton 118). Also, in 1981, Borowski won the right in the Supreme Court of Canada to challenge Canada's abortion law, arguing that the law violated the 1960 Canadian Bill of Rights, and seeking an injunction which would prohibit the federal funding of abortions (93). In the first instance, Borowski, along with his lawyer, Morris Shumiatcher, claimed that the abortion law violated the affirmation in the Bill of Rights that declared the "dignity and worth of the human person," "the right of the individual to life," and the "right not to be deprived thereof except by due process of law" (92). Using medical evidence to testify to the existence of human life before birth, they claimed that the foetus falls under the statutes of the Bill of Rights, and that, consequently, the abortion law should be declared invalid. The fact that Borowski's "trial for life" was defeated in 1988 by the Morgentaler decision does not influence my reading of the abortion debate or dictate my focus on Morgenataler. Both men challenged the courts, instigating the use of litigation to shape public policy. However, Borowski's conservative, religious perspective was, given the new, liberal-individual rights emphasis of the times, destined in my opinion to lose. Consequently, Morgentaler's perspective speaks more to the tensions, inconsistencies, and themes of our present configuration of individual rights and liberties.

[2] As F. L. Morton writes, "their respective campaigns of civil disobedience and constitutional challenges to Canada's abortion law spanned two decades, took each man to the Supreme Court of Canada twice, sent both to jail, and left in their wake a new abortion policy" (9).

"Jewish versus Christian" (15). As F. L. Morton points out in *Pro-Choice vs. Pro-Life: Abortion and the Courts in Canada*, the controversy not only "resonated with the ongoing battle between religion and modern science, between nature and technology," but it also "opened up one of the traditional debates of liberal democracy—the question of where the private ends and the public begins—and, with it, the new conflict between feminists and those supporting an older, traditional, family-centred view of society (15). Within this controversial and often contradictory arena, the abortion question ultimately became, not only a battle over who had more rights—the woman or her foetus—but a battle about how those rights would be legislated.

As F. L. Morton points out, the Charter did not "create new rights so much as it created a new way of making decisions about rights in which courts have played a more central and authoritative role.[3] The Charter has created a new forum: courts; a new set of decision makers: judges; and a new resource: not votes or money but simply the 'right argument'" (300). In this scenario, the discretion of judges is maximized, "thereby giving almost all interest groups at least the hope of winning a test case on the back of a plausible interpretation of a Charter right, regardless of its original or intended meaning" (301).

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[3] To contextualize this debate in a historical perspective, it is accurate to say that from the nineteenth century up until the late 1960s, abortion or the elimination of unwanted children in Canada was an illegal practice. The Canadian parliament criminalized abortion in 1869, punishable with life imprisonment, and in 1892 parliament issued the "first statutory prohibition against the sale, distribution, and advertisement of contraceptives" (Childbirth by Choice). It was only in 1969 that the Canadian Criminal Code was amended to legalize contraceptive use and medically approved abortions, and it was not until 1988 that abortion was fully legalized in Canada. As Angus McLaren and Arlene Tigar McLaren stress, however, the amendment of these earlier laws did not reflect only a progressive or an emancipatory agenda, a scenario where "the forces of ignorance" were fought back in favour of the "public acceptance for family planning"and women's rights (10); rather, these issues and their particular configuration in time reflected a particular social context and particular relations of public and private power that often masked itself in an agenda and in certain causes that made the issues acceptable to the general public.

In this chapter, I explore the abortion controversy in an attempt to understand how this legalistic rights-based and truth-bearing framework creates and endorses a universal form of rational, able-bodied personhood that envisions the non-normative, non-rational, undeveloped or disabled individual as its antithesis. An examination of Henry Morgentaler's crusade, and the 1988 Morgentaler decision in particular, is instructive first, because it instigated a new form of Canadian politics—the use of litigation to influence public policy and instigate change—and second, because the arguments surrounding the controversy rest, at least in part, on the binary or antithetical relationships established by Morgentaler: the relationship between women and the foetus; between traditional, middle-class, family-centred, "rational" women and non-traditional, single, poor or "unreasoned" women; between foetuses who have the potential to perpetuate the middle-class social norm and those who could potentially, later in life, disturb the "normal" social order; between able-bodied and disabled individuals; between rational and non-rational individuals; and between those individuals who are healthy and those individuals who are suffering from illness or pain. In that these binary relationships are perceived in a hierarchical and teleological relationship to one another, they establish, for the Canadian public, universal stereotypical notions of what forms of humanity are acceptable or unacceptable.

Inasmuch as these legal interpretations become fixed as "standard" responses to certain types of people, and inasmuch as these standard responses are supported and perpetuated by the medical establishment, the media, and public opinion, they become fixed in the Canadian consciousness as "normal" responses to non-normative people. While this response, paradoxically, affirms the rights of certain "more acceptable"

minorities, they point on a sliding scale to the potentially dire consequences of this "inequality" for non-normative people, including the unborn, the aged, and people with disabilities.[4]

In an attempt to analyse how this inequality occurs, my analysis rebels against what I perceive to be dehumanising abstractions, focusing instead on what has been called in Critical Legal Theory a "call to context" (Massaro 2099). In doing this, I perform a rhetorical and political analysis of the *Charter of Rights and Freedoms* and its interpretation in the abortion controversy. I argue that this interpretation speaks to the normative liberal-democratic political context, establishing, as it does so, a normative standard for judging equality, and a politics of rights based on a hierarchical construction of personhood. I then consider how this concept of "(un)equal" personhood is visible in the 1988 Morgentaler Decision. I argue that this decision exposes the rhetorical ethical slide from a desire to liberate women, improving and sustaining their lives, to a desire to eliminate all potentially burdensome or "unwanted" subjects before they are born, and, as the subsequent Rodriguez and Latimer chapters indicate, after they are born as well.[5]

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[4] In Canada, the development of disability rights has been determined to a large extent by a federal-provincial struggle about "who should do what in the political arena" (Torjman 151). Prior to the introduction of the *Charter of Rights and Freedoms* , concerns around disability were handled mainly by the provinces and contained within the all-inclusive rubric of health issues. Consequently, legislation, which was concerned with welfare, social services, health issues, and income security, revolved around policies such as the *Canada Assistance Plan* (CAP), *Established Programs Financing* (EFP), and the *Canada Health and Social Transfer* (CHST) program. These policies were instrumental in providing disabled Canadians with their basic assistance, but they did not address the larger issues of citizenship and inclusion. The rise of the civil rights movements in the 1960s and 1970s, however, instigated a demand for not simply compensation, but for full inclusion and full citizenship. These demands were eventually addressed by federal policy and, in particular, the implementation of the new *Constitution Act* in 1982. The inclusion within this act of the *Canadian Charter of Human Rights and Freedoms* had special significance for all minority groups, and, for the purpose of my analysis, for people with disabilities in particular.

[5] I do not attempt here a complete analysis of the abortion debate because it is beyond the scope of this project; neither do I attempt to take sides in the abortion issue. Like many women, intellectually I fully support women's right to control their own bodies, and would not deny any woman the right to an abortion. However, in practice I am ambivalent about the morality of the issue: worried that the slippery slope, which has already led to the acceptance of third-trimester abortions and the endorsement of infant euthanasia, will

By exposing Morgentaler's role in the abortion debate, I attempt to qualify Foucault's biopolitical (power over life), life-affirming analysis with an emphasis on its contextualization in the late twentieth century, and the increasing emphasis given to life-negating discourses and practices. If, as Foucault states, the supervision of the population, "through an entire series of interventions and regulatory controls," was geared, in the nineteenth and early twentieth centuries, towards the mandate to "ensure, sustain and multiply life," its manifestation in the late twentieth century, as the Morgentaler decision would seem to indicate, is geared more to the desire to "disallow life" through the regulation and administration of death (Foucault *History of Sexuality* 138).[6]

Indicative of a new form of "political sovereignty which would be a government of all and of each, and whose concerns would be at once to 'totalise' and to 'individualize'" (Gordon 3), the abortion controversy's participation in these "death practices" can be seen to contribute both to the liberation of individual autonomy and personal power and the affirmation of a new form of state power. This new form of power is, as Michel Foucault observes, less about the abdication of state power than it is about establishing "techniques of power" (*History of Sexuality* 109) that use the network of "social and economic institutions" (Gordon 4), relations and discourses to subjugate

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lead to a larger concern to eliminate other vulnerable individuals, who because of their physical and/or cognitive disabilities, are deemed unwanted. My intention, then, is to analyse how this slippery slide occurs in Morgentaler's liberatory and overtly feminist agenda.

[6] Rabinow and Rose, in their introduction to *The Essential Foucault,* insist that "if biopower sutures together the management of life and the management of death, today 'the dream of power' focuses on the pole of life" (xxx). In this respect, their point that practices such as "selective abortion, selective foetal implantation, euthanasia, brain death, and the end of life" management can be "presented as the universalization of the well-run welfare state, [and] the spread of liberal democracy" is well taken (xxx). However, although my analysis of these practices does not deny this life-managing aspect, it seeks to expose these practices and discourses as the other side of the management coin. In other words, it is concerned to explore how the administration of death works in specific practices and discourses to affirm not life, but the 'required' deaths of certain 'unacceptable' individuals. From this perspective, these death practices are not the "hidden truth of modern power," but, rather, given the conditions present in the twenty-first century, its focus.

individuals, at the same time as it holds out to them the promise of freedom and/or, as seen in respect to foetuses, people who are terminally ill or disabled, death.[7]

Abortion and The Canadian Charter of Rights and Freedoms

When the *Canadian Charter of Rights and Freedom* was framed, one of its central objectives was to "strengthen national unity by focusing Canadians of all backgrounds on the political values they hold in common" (Cric 32). Promoted by Pierre Trudeau as the "People's Package," the Charter was intended to be a "symbol of national identity," promoting and defining "the very ideal of Canada: a pluralist, inclusive and tolerant country, one in which *all* citizens could feel equally at home" (32). Specifically, because the Charter grounded the ideals of equality, liberty, and security or protection of all persons in a promise to provide all Canadians with "foolproof protection for [their] rights" (Mandel 39), it was considered to be "one of the most valuable possessions the people of a democratic country [could] have" (Canada qtd in Mandel 39). Limiting "the power of both provincial and federal governments in favour of the rights of individual citizens," it gave "people the power to appeal to the courts if they [felt] their rights [had] been infringed or denied" (39), establishing "a new rights consciousness [that] hopefully would promote the national focus of Canadian public life and discourage the ugly politics of ethnic prejudice and regional chauvinism that had historically coloured Canadian politics" (Morton 108).

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[7] The ambiguity implied in the slash between "and/or" in this sentence speaks to the rhetoric of choice. Those who choose or are able to be rehabilitated back into the normative folds of society are promised freedom. However, those who, like Rodriguez, are unable to be rehabilitated, or, those who like Tracy Latimer, are considered to be past the possibilities of rehabilitation, are presented with only one option: death.

In that the Charter offers individuals and minority groups a "heaven-sent opportunity" for establishing in law their own explicit rights and version(s) of equality and liberty, it can be seen to open up "the terrain for a variety of negotiations" essential to a free and democratic society (109). In this way, the Charter speaks idealistically to both democratic and liberal ideals, creating a legal framework within which equality and individual liberty may be achieved. This idealistic aim and pluralistic vision, however, does not account for the tension that exists between the conflicting interests of what Torben Bech Dyrberg in *The Circular Structure of Power* calls the liberal "politics of individual interests and the public interest in democracy" (183). Because these individual and public interests are linked problematically both "to a foundationalist or essentialist grounding" in democratic universal rights and an individualistic liberal grounding in the rights of specific individuals and "specific communities" (Laclau 7), any attempt to come to terms with the notion of a common or an individual good must take into account this paradoxical agonistic or even antagonistic conflict at the heart of liberal-democratic constitutional rule.

Engaging with what she sees as this central conflict in liberal-democratic rule, Chantal Mouffe argues with Dyrberg that the failure to acknowledge this conflict constitutes a blind spot that has potentially dangerous consequences for individuals who do not conform to the norm. Because in liberal-democratic and pluralist politics the individual is not only "free and equal but also . . . [a] reasonable" or rational human being capable of relating their specific rights to a universal legitimate concept of the demos, he or she must internalise the pluralist desire to valorize *all* differences, as speaking only to those differences that appear in narrow relationship to a universal or "normal" standard

(90). The individual who does not or cannot meet these normative standards occupies the "constitutive outside" of the nation (20), and, as such, is vulnerable to a form of closure that is exclusionary, antagonistic, dominating and potentially violent (21).

Addressing this conflict, Chantal Mouffe attempts to theorize a new form of liberal-democratic politics that not only acknowledges the potential for conflict, but attempts to theorize a form of conflict that is productive. Distinguishing between antagonistic and "agonistic" conflict, Mouffe argues that, while antagonistic conflict indicates the relationship "between enemies, that is, persons who have no common symbolic space," agonistic relations indicate the relationship between "adversaries: adversaries being defined in a paradoxical way as "friendly enemies," that is, persons who are friends because they share a common symbolic space but also enemies because they want to organize this common symbolic space in a different way" (13). By promoting a common symbolic space in which confrontation is not denied, but kept open, in constant renegotiation, agonistic politics offers a solution to antagonistic liberal-democratic relations. By keeping open the sense of a shared symbolic space, agonistic politics addresses the paradoxical conflict at the heart of liberal-democratic relations, exposing the limits of pluralism and its affirmation of heterogeneity by revealing that "some existing rights have been constructed on the very exclusion or subordination of others" (20).

A reading of the abortion debate and its contextualization within the *Canadian Charter of Rights and Freedoms* while it was still in its formative stages is indicative of how these relations of subordination occur. While, in one respect, the abortion debate enables an examination of the universally-established pluralistic liberal-democratic

values of neutrality, rationality, equality, and liberty, in another respect, it refuses this examination, having attributed a hegemonic meaning to these values that has determined the range of possible interpretations. In that the abortion issue, as it exemplifies adversarial pro-life and pro-choice relations that attempt to organize the *Charter of Rights and Freedoms* in ways suited to their competing interests, creates "necessary exclusions" and an "us-them" dichotomy that is, under certain conditions, transformed into antagonistic relations, it has, I will argue, both liberatory and potentially dire consequences for those who exist either inside or outside of the legally-defined norm (Mouffe 13).

For women, as a minority group, the drafting of the Charter provided an arena in which they could question power relations and voice their concerns about the way in which medical and legal establishments had historically denied them equality and the right to make decisions for themselves. In that the abortion issue coincided with the attempt to revise the federally-established *Canadian Bill of Rights* in terms of the more liberal, equality-based Charter, it gave women the chance to challenge and change the legal system, denying the rights of the medical and legal establishments to control women's fertility for "greater" public ends, while establishing for women the rights to their own bodies and sexual reproduction. By challenging medical definitions and by using instead a language of rights, women were able to argue for the legal and moral right to choose abortion. As Jane Jenson argues in her book, *The Politics of Abortion*, "access to abortion was a basic need for women's liberation" (45). Not only did the abortion issue "create solidarity across the existing divisions among women," it addressed the historical construction of women's "inequality" (45). Because women were uniting over their right

to make their own biological, social, and economic decisions, abortion became a timely vehicle for women's liberation, sending the message to the Canadian population that "women were individuals equal to any other in society" (49).

In terms of establishing equality for women, Canadian feminists, mounting what has been considered *the* most effective minority campaign, lobbied Parliament for favourable wording in Section 15, the equality rights clause in the draft of the Charter (Knopff and Morton 28).[8] They fought successfully for the "right to equality 'under the law' and 'equal benefit of the law' in an attempt to emphasize that equality means more than non-discrimination" (Morton 111), and they obtained an "additional guarantee of sexual equality (now section 28) intended to take precedence over the 'reasonable limitations' loophole of section 1" (111). They also took issue with the *Charter* language, and particularly the use of "everyone" in section 7—"Everyone had the right to life, liberty, and security of the person"— and section 12—"Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." Their argument that the all-inclusive 'everyone' should, because of its "vagueness and lack of any prior legal definition" (Morton 112), be changed to 'every person' expressed their awareness that, at least where legal matters are concerned, the symbolic definitions of "acceptable" forms of personhood are crucial to the establishment of individual and group rights.

As F.L. Morton suggests, on one level this attempt to change the language in the Charter reflects the desire to privilege and empower women. By focusing on "person"

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[8] Mainly, the fight to legalize women's rights to their own reproductive choices became the responsibility of the Canadian Alliance for the Repeal of the Abortion Law (CARAL) and other left-leaning feminist groups, such as the National Council of Women and the Association for the Modernization of Canadian Abortion Laws (Jenson 46). It was these groups who recognized the importance of entrenching women's rights in Canadian law, and who, consequently, lobbied rigorously for changes to the *Canadian Charter of Rights and Freedoms* while it was still in the draft stage. The right to abortion was one of the main issues on their agenda.

instead of "everyone," feminist abortion groups, such as the Canadian Abortion Rights Action League (CARAL) and the National Council of Women, hoped to draw attention to the 1929 "Persons' case," which set a precedent for recognising and privileging women as legal persons;[9] on another level, however, the focus on "person" can be read, in relation to the ongoing debate about abortion, as the desire to exclude the foetus from this privileged category, thereby denying the foetus any legal rights. In keeping with this interpretation, the Canadian Abortion Rights Action League (CARAL) protested the use of "everyone" on legal grounds, claiming that

> Any lawyer worth his salt or her salt would of course take advantage of that phrase in this constitution. . . . [T]his language is completely open to litigation and to the argument that somehow Parliament intended to create rights in the foetus or embryo, and if Parliament does not intend that then we suggest they must include a section which explicitly states that. (CARAL representative qtd in Morton 112)

CARAL also recommended that the *Charter* include a section stating "that nothing in this Charter is intended to extend rights to the embryo or foetus nor to restrict in any manner the right of women to a medically safe abortion" (113). While this recommendation was unsuccessful, it did establish an antagonistic, rather than a simply agonistic, us-them distinction that was, at least in this case, seen as essential to the "constitution of collective political [female] identities (Mouffe 12).

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[9] Although in Canada women gained the right to vote in federal elections in 1918, they only attained the right to call themselves "persons" in 1929. This right extended women's existing rights by enabling their appointment to the Senate. The abortion debate can be read as an attempt by women to further materialize this right, enabling women to choose freely what to do with their bodies and their lives.

Similarly, fighting for the rights of the foetus, the pro-life faction, under the rubric of the Coalition For The Protection of Human Life, also used the common symbolic space of the *Charter* for its own ends. Refusing women's right to choose, while concomitantly insisting on the rights of the foetus, pro-life supporters campaigned for favourable wording while the *Charter* was still in the draft stage. Strongly objecting to the recommendations that "everyone"should be replaced by "every person," they argued that Section 7 should be amended to read that "everyone from conception until natural death has the right to life" (Morton 113). While this dispute is typical of what Mouffe terms "agonistic" relations, in that both pro-choice and pro-life activists attempt to organize the space of the Charter in a way that privileges their own interests,[10] it also exemplifies how competing groups keep open a political space of contestation that is not neutral or objective, but, rather, antagonistic, exclusionary, and potentially violent.[11]

These antagonistic and potentially violent contestations are framed on one side by an adherence to exclusive narratives of personhood that promote and privilege liberal virtues of rational, autonomous, responsible citizenship, and on the other by conscious and unconscious conceptual mechanisms that devalue, discriminate against and dehumanise those who do not conform to the liberal ideal. In that this binary affirms a way of seeing, conceiving and knowing the world, it establishes a standard for the acceptance of "normal" people, while making possible an understanding of the other through the process of exclusion and elimination.

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[10] A*gonistic,* as in Mouffe's term "agonistic," can be understood symbolically in relation to the ancient Greek term denoting "athletic contests." In this way, the term implies relations that are "polemic, combative; strained, aiming at effect" (*Oxford English Dictionary* 26).

[11] Here I am referring both to the psychological and physical violence committed against women and the unborn, as well as the violence committed in the name of religion by extremists from the pro-life faction. This violence manifested as civil riots, physical abuse, death threats, and even, in the case of Dr. Gary Romalis, attempted murder.

It is to the framers' credit, then, that because conflicting moral and ideological positions on what counts as viable and valuable human life could not be easily or clearly resolved, they refused to define the concept of personhood implied by the Charter's use of "everyone." Ultimately, this led, in the original framing of the Charter, to parliament's declaration of constitutional neutrality on the issue of abortion. Given this constitutional neutrality, the Courts, which were now enabled by the Charter to decide "the important questions of the day" (Mandel 455), were left to weigh and judge competing interests from a neutral liberal-democratic viewpoint—a viewpoint that expresses the "idea" that liberal democracy is "neutral with respect to any particular set of values" (Mouffe 23). [12]

Contextualized in this demand for neutrality, lawyers, the jury, and ultimately judges must decide whose life—that is, the right to have a life and the right to live life according to one's own choosing—is more viable. Lawyers, the jury and, ultimately, the judge are responsible for deciding whose interests most accurately reflect the values held by all Canadians in a liberal democracy. In other words, while under the Charter "everyone" has a right to life and a right to have that life protected, in the courts of law the person who would eventually get that right enshrined in law would be the person who ultimately had the argument that best conforms to normative liberal-democratic values. In this respect, neutrality is not value free; in the courts of law, where argumentation is central, neutrality itself becomes strategic.

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[12] Pierre Trudeau believed that Parliament should be responsible for deciding these contentious issues. For example, in response to a request by the Catholic bishops to add a clause to the Charter that would protect the rights of the foetus, he declared that "no provision of the Charter . . . is reasonably capable of an interpretation that would either enshrine a right to abortion or a right to life for the unborn or deny the ability of Parliament to legislate on the matter in the context of the Criminal Code" (Trudeau qtd in Morton 122).

What is implied by the legal requirement that judges, jurors, and lawyers maintain a "sense" of neutrality is a perceived allegiance to democratic values, and, concomitantly an allegiance to liberty. Although these allegiances, and their specific relationship to neutrality, appear as guaranteed rights for "everyone" in the *Canadian Charter of Rights and Freedoms,* the actual manifestation of these rights is created through the competitive realm of rational argumentation: the use of reason (rather than sense experience) to produce a conclusion that may not be logically valid (in that the conclusion follows from valid premises), but which, in the eyes of the courts and the general public, is persuasive enough, given the general zeitgeist and the specific context of the case, to induce belief. In this way, neutrality, while appearing to offer a rhetorical guarantee of fairness, is impossible to maintain (Pottage 176).

John Rawls' philosophical theory of a "just society" is informative here in that it attempts to create a "fair" concept of justice, which situates liberal-democratic principles firmly within a universal, rational, and objective framework. Taking issue with the liberal principle of neutrality and its procedural application, Rawls argues that neutrality should be the product of a rational and a moral consensus. As Rawls explains, the neutral liberal endeavour "is a theory of moral sentiments . . . setting out the principles governing our moral powers, or more specifically, our sense of justice" (*Theory of Justice* 51). By establishing a rational and moral universalising sense of what this neutral liberal endeavour entails, Rawls, by extension, is able to posit that liberalism provides a consensus by establishing "the political principles that should be accepted by all despite their differences" (Mouffe 23).

This Rawlsian concept of liberal-democratic neutrality, then, although pertaining to fairness, is not value free. His philosophy rests on the assumption that a moral consensus and "sense of justice" is informed first by universally-established liberal-democratic principles, what may be termed "*reasonable* doctrines," and second by a universal concept of rational persons or "*reasonable* citizens" (Mouffe 24). According to Rawls, it is only rational citizens who are capable of resolving any potential "deep doctrinal disagreements," and securing a moral consensus. Rawls defines these individuals as rational people who have realized their "moral powers to a degree sufficient to be free and equal citizens in a constitutional regime, and who have an enduring desire to honour fair terms of cooperation and to be fully cooperating members of society" (Rawls *Political Liberalism* xvii). This "reasonable" concept hinges on the theoretical assumption that individuals will assume the ideal "original" or neutral position[13] in order to focus their moral sensibilities so that they can consider and judge more intuitively the moral relevance to individuals of the liberal-democratic ideals of justice and fairness (*Theory of Justice* 12).

Paradoxically, however, within this realm of political theorizing, justness, fairness, and even liberty depend not on a universal acceptance of an inclusive, "equal" concept of humanity, but, rather, on exclusionary concepts of what constitutes an

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[13] Rawls' theory of the "original position" has, as its logical starting point, a hypothetical situation characterised by the idea that "no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence and strength and the like" (*Theory of Justice* 12). In other words, the original position, and its corresponding "veil of ignorance," posits that if people are denied knowledge of their present and future beliefs, circumstances, and natural endowments, they will, in an attempt to pursue what is in their own rational self-interest, choose fair and just principles to "govern the assignment of rights and duties and to regulate the distribution of social and economic advantages" (61).

"acceptable" or valued liberally-defined human personhood.[14] In other words, liberty and equality are relative terms. Their use is not dependent upon universal neutral and/or constitutional judgements that claim liberty and equality for all, but, rather, upon subjective judgments concerning the extent to which an individual can or is capable of fulfilling the rational, moral requirement of a liberally-defined "normal" human personhood. From Rawls' perspective, liberal-democratic pluralism indicates, in post-modern terms, not "the end of a substantive idea of the good life" (Mouffe 18), "the dissolution of the markers of certainty (Lefort 19), but, rather, "a symbolic ordering of social relations" that aims to contain individual diversity in already established, normative frameworks of rational understanding (Mouffe 18).

In this way, supporting the rights of women in the abortion issue can be seen as a validation and affirmation of their status as independent, "different" persons, but only as long as that concept of personhood can be read in normative terms, in relation to liberal notions of rational or reasonable morality, and in relation to liberal moral commitments that structure and guide rational individual conceptions of the good life and the good or 'normal' individual. The extent to which women are able to adopt the liberal qualities of "self-possession, . . . autonomy, abstraction, self-determining status and public action," is the extent to which they are able to claim formal legal equality (Hunter and Mack 173). From this perspective, it becomes evident that in a liberal democracy women are, or should be, accorded the same choices and the same rights as other human beings precisely because, as 'just' liberal subjects in a "just" liberal society, they embody what

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[14] Another way of looking at this is to argue that although Rawls' original position assumes a hypothetical equal basis for thinking about the liberty of individuals, in reality the liberties of equal citizenship are always constrained, in a normative sense, by duties, prohibitions, rules, public opinion, social pressure, and "unequal" political considerations of class, poverty, gender, and disability.

Rawls calls an "expectation" of able-bodied "well-being" (*Theory of Justice* 64), and possess the "capacity to frame, revise, and rationally to pursue a conception of the good" (Mulhall and Swift 11). [15]

For Rawls, then, what appears to be a "recognition of opposed conceptions of the good," is, in practice, a recognition that is bounded by a definition of "reasonable persons," and their concomitant moral obligations as "free and equal," seemingly autonomous, citizens (Mouffe 24). While the recognition that women have legal rights as rational, autonomous persons liberates them, albeit within the confines of the system, it also homogenizes them according to a reified set of cultural meanings to which "everyone" consensually agrees.[16] In this way, what is fore-grounded is not specifically a recognition of women's difference, but a recognition of their "essential" sameness, as that sameness is defined by the dominant normative hegemony.

Additionally, it is possible to see that if viable rational personhood becomes the grounds for women's inclusion, it also, conversely, becomes the grounds for the foetuses' exclusion. Because the "unborn have never been recognized as persons in the *whole* sense" they are refused the rights accorded to other persons (Blackmun qtd in Poundstone

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[15] This is not to say that the law does not discriminate against women in the way in which it divides male and female subjects into two " 'natural' sex categories which are oppositional, hierarchical, and exhaustive" (Hunter and Mack 172); rather, I argue that liberating women in relation to their own reproductive rights served the larger liberal project of regulating subjectivities. In Judith Butler's terms, in that women are able to identify with men's ability to control their own bodies, they align themselves, unconsciously, with the "we" that is implied by constitutional, liberal-democratic, law (*Bodies That Matter* 105).

[16] It is this homogenisation, and what Peter Gabel would call a resulting passification, that makes it possible to ignore how women's liberation is structured unequally in relation to different female lifestyles and perspectives, and in relation to different classed, raced, sexed or disabled women. For example, although the liberatory call for "equal access" to abortion has been conventionally seen as a call to liberate oppressed working-class women who do not have the same social or economic opportunities as middle-class women, it ignores how working-class women have been encouraged to terminate their pregnancies, not for some vague notion of equality between women, but because of the belief that lower-class women will raise their children in sub-standard and unloving environments that will cause them to grow up to be delinquent, violent, and damaging to society (Morgentaler *Abortion and Contraception* 133).

232 my italics). Figured in language as "inanimate appendage[s]" (Poddell 8) or as "foreign [bodies]" (Williams, Camille 65), a picture of "unwholeness" is created and rhetorically repeated in a metonymical interchange of terms—foetus is substituted as a medical term for the more colloquial baby, viability is substituted for life, life is substituted for person, and the unborn is substituted for person and/or the foetus—that denies the foetus a legitimate political identity, and, concomitantly, the legal protection of his or her life. In abstract legal terms, the foetus, then, has no rights. Because this denial refuses the foetus the rights accorded to persons, it also refuses the foetus the right to life.

While this analysis reveals that "personhood" is a philosophical and legal construct, it also, more importantly, shows how this concept of personhood is constructed in and through language. As Butler argues, language has agency:

> We do things with language, produce effects with language, and we do things to language, but language is also the thing that we do. Language is a name for our doing: both 'what' we do (the name for the action that we characteristically perform) and that which we effect, the act and its consequences. (*Excitable Speech* 8)

Language, as "an instrument through which power is exercised," is capable of affirming life or performing a "specific kind of injury" (8). Although this injury, formed as it is in language, is not "quite the act that it portends, it is still an act, a speech act, one that not only announces the act to come, but registers a certain force in language" that is inherently violent in itself (9). In this way, as Butler explains, the threat "begins the performance of that which it threatens to perform; but in not quite fully performing it, seeks to establish, through language, the certitude of that future in which it will be

performed (9). In refusing the foetus' claim to personhood on "reasonable" grounds, the "threat" that begins with the abstract, scientific construction of the foetus in language "acquires its own violent force," and, in doing so, "presages and inaugurates a subsequent force" that makes acceptable the physical expulsion of the foetus. In this way, language is able to constitute subjects, becoming "the vehicle" through which social subjects and the social structure are signified and reinstated, while also enacting a domination that denies certain individuals their subjectivity (18).

While Butler focuses on the agency of language, and by implication the individual responsibility that the force of language implies, one of her main themes is the relationship between language and the body. Not only does she suggest that "what is spoken in language may prefigure what the body might do," but that "the speech act" cannot be understood apart from its connection to the body: it is the speaking body or the "bodily act" (11) that "becomes a sign of unknowingness precisely because its actions are never fully consciously directed or volitional" (10). For Butler, then, "the body is the blindspot of speech," the body acts "in excess of what is said," while also acting "in and through what is said" (11). By implication, then, the reason of speech can never be contained; it is always compromised by its relationship to the body.

Similarly, Chantal Mouffe, drawing on the work of Ludwig Wittgenstein, is also concerned to explore the limits of reason in language. For Mouffe, language constitutes "an ensemble of language games" that function in practice to construct "democratic forms of individuality" (12), and, concomitantly, to foster a belief in the "superiority of liberal democracy" (11). Quoting Wittgenstein, Mouffe argues that agreement in language "is established not on significations . . . but on forms of life. It is *Einstimmung*,

fusion of voices made possible by a common form of life, not *Einverstand*, product of reason . . .[that] not only indicates the nature of every consensus but also reveals its limits" (70).

From this perspective, language works not by enabling "sophisticated rational argument" or by enforcing abstract, "context-transcendent truth claims," but by reinforcing the common forms of life in a "picture" that "[holds] us captive," and which we cannot "get outside" of, "for it [lies] in our language and language [seems] to repeat it to us inexorably" (Wittgenstein 115). In terms of creating a belief in the major tenets of liberal-democratic rule, this repetitious picture necessarily takes the form of the good liberal subject. As Mouffe argues, instead of, as Wittgenstein's theory suggests, "[acknowledging] and [valorizing] the diversity of ways in which the 'democratic game' can be played," the tendency in a liberal democracy is to "reduce this diversity to a uniform model of citizenship" (73). In this respect, Mouffe's argument parallels Butler's argument in that the "force of the speech act" is secured through convention and through the "ritualised repetition of convention" (Butler *Excitable Speech* 24-5). In an affirmative sense, it is the repetitious verbal utterance or call to liberal-democratic subjectivity that prompts an "act of recognition [that] becomes an act of constitution: the address animates the subject into existence" (25).[17]

Prompting a verbal and visual "*identification* with democratic values" (Mouffe 70) language reinforces "an agreement not only in definitions but also (queer as it may sound) in *judgements*" that translate into practices (Wittgenstein qtd in Mouffe 68). For

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[17] Butler is drawing on the work of Louis Althusser here. In "Ideology and Ideological State Apparatuses," he theorizes the analogical scene of interpellation. In this scene, the individual is hailed by a policeman, and, in recognizing him or herself as the one who is being hailed, acquires a subjected identity.

example, in relation to the abortion debate's negotiation of the Charter, the fight to change "everyone" to every "person" invokes a historical repetition not of an abstract idea of women's liberation, but rather of a specific context—the "Person's Case"—in which the fight for women's liberation was judged legitimate. Because this legitimation rested on the ability of women to meet the liberal requirement for rational, autonomous individuality, the picture, repeated in the word "person," affirms women's citizenship and their right to make and fight for their own reproductive choices.

Alternately, however, the attempt to claim for the foetus the rights of personhood evokes no recognizable picture or body. Figured only as "potential life," the foetus is considered by many pro-choice advocates as neither a person nor even a human being. According to Henry Morgentaler in *Abortion and Contraception*, the foetus does not "[acquire] a sufficiently developed brain to be considered a human being" until the age of approximately five months (148), and "real human life" or personhood does not start until birth (125). Without recourse to secular, scientific proof that establishes in language a recognition of the foetus as a rational, self-conscious person, the foetus is destined to remain in the conventional liberal-democratic imagination and in the language of the courts as an unrecognisable "other."[18]

The desire to fix in the rhetoric and language of liberal-democratic rule and language the requirements for liberal-democratic personhood indicates what Mouffe calls

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[18] In *Excitable Speech,* Judith Butler states that "One 'exists' not only by virtue of being recognized, but, in prior sense, by being *recognizable.* The terms that facilitate recognition are themselves conventional, the effects and instruments of a social ritual that decide, often through exclusion and violence, the linguistic conditions of survivable subjects" (5). It is interesting to note here that the AbortionNo web project uses this strategy of recognizable identification to shock viewers into identifying with the maimed and mutilated bodies of humanly recognizable foetuses. Using the *Webster's New World Encyclopedia* to identify genocide as the "deliberate and systematic destruction of a national, racial, religious, political, cultural, ethnic or other group defined by the exterminators as undesirable," they compare abortion to genocide, juxtaposing pictures of murdered Cambodians, Rwandan Tutsis, and European Jews with American aborted newborns, subverting the notion of choice by reading it as a choice not to kill (AbortionNo.org).

"our modern predicament" (61). This predicament reads as irreconcilable the contemporaneous "craving for certainty" and the post-modern ability to live with "relativity, doubt" and difference (61). Although the Charter, as a pluralistic blueprint for a specifically Canadian liberal-democratic rule, purports to value difference, the desire to resolve competing interests through a recourse to "certainty" and the concomitant creation of a moral consensus ultimately reduces the constitutive role that difference plays to the "logic of the same" (May 2). For Todd May, this reduction is founded on the philosophical problem of how "to conceive of difference and how to valorise it" (2), when difference itself is marginalized in the constitutive attempt to "constrain people's lives and identities within normatively defined" and normatively imagined "parameters" (4).[19]

The conceptual slippage implied by the constitution of difference as sameness problematizes the liberalizing, pluralistic, post-modern project that "promises Canadians foolproof protection of [their] rights" and freedoms" (Mandel 41). Although the interpretation of Charter language does enable a new liberatory politics of rights, concerned with social issues and the rights of "non-territorial identities," such as gender, ethnicity, race, and disability (Morton 298),[20] in reality, these rights are always already contained and even "fixed" within a normative and insidious framework of meaning that

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[19] Writing about the multiple ways in which difference is elided first in thought, May argues that: "Thinking of community in terms of a common substance that we all must participate in marginalizes those who are different from the participants in that common substance; thinking of language in terms of presence masks the difference that subtends it; thinking of ethics in terms of the likeness or analogies of others to oneself refuses the insight that what is ethically relevant is often the difference of others from oneself; thinking of ontology in terms of identity precludes consideration of ontological possibilities that are irreducible to any identity . In all these cases, the different—although in each case it is a different "different"—is lost, distorted, repressed, or reduced" (4).

[20] Underlying this notion of "non-territorial" identities is an assumption that these identities, which reflect universally the shared characteristics of all "Charter Canadians," enable new power structures that find concrete expression in new universalising networks and coalitions (Morton 299).

defines to whom "everyone" and "all" refers. In this way, Charter tenets are revealed as "a collection of vague incantations of lofty but entirely abstract ideals" (Mandel 43), universalising generalizations that come with "no instructions whatsoever on how they are to be achieved in reality" (41).

Foucault's argument that constitutional law, while appearing to liberate, makes "an essentially normalizing power acceptable" is relevant here (*History of Sexuality* 144). While pluralism might be considered the defining feature of contemporary Canadian liberal democracy, pluralism itself does not imply, as the equality clause of the Charter might have us believe, an equal recognition of different persons and experiences. Rather, pluralism, as it is constructed by Charter tenets and the Charter's aim to reach across difference to bring into being a "new" constitution concerned with individual rights and freedoms, is compromised by the hierarchical construction of these individuals and these rights in the abstract, politicised language of constitutional interpretation. In other words, a just and fair legal system is, in practice, always already mediated and contained by the tendency of legal interpretation to "[mark] a division between the *inside* and the *outside* of the social:" the symbolic and very 'real' exclusionary division that, paradoxically, makes any substantial acknowledgement or expression of difference impossible (Lefort 17).

The Politics of Interpretation: Abortion and the Courts

In affirming foetal rights, and the rights and responsibilities of pro-life groups, pro-choice groups, women, and feminist groups, which become in this debate a major political force (Morton 264), the abortion issue in Canada reflects both the 1982 Charter's

mandate to protect the civil liberties of individuals, and its democratic ability to accord increasing power to diverse minority groups. Moreover, by referring the resolution of morally controversial issues to the courts, Charter litigation has created a "new" democratic forum for individuals and "for interest group activity," a "new access point in the decision making process" that allows the liberty and equality interests of competing individuals and competing truths and facts to be weighed and judged from a hypothetical "neutral" perspective in the courts of law (30). In this way, the law becomes a contentious space, a locus of power, where these often politically explosive issues can be negotiated and reframed by impartial, neutral, objective, and universal judgements that aim to establish justice and fairness for all (Minow 37).

Deciding the competing interests of individuals and interest groups through the Charter depends, however, as Knopff and Morton argue, not so much on the implementation of a neutral, objective ideal, but, rather, on the politics of interpretation. From this perspective, judicial decisions are not neutral. The extent to which they take either a restrained conservative approach to the law or an activist liberal approach is the extent to which they are willing to remain either within the law's procedural boundaries, confining their interpretations to the original understanding of Charter tenets in an attempt to maintain parliament's authority in deciding these issues (interpretivist approach), or within a school of thought that utilizes the law to effect social change or public policy (non-interpretivist approach).[21]

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[21] Interpretivist and noninterpretivist approaches to law can be aligned with judicial self –restraint and judicial activist approaches to determining the meaning of a constitutional text: "The interpretivist approach, . . . stresses judicial fidelity to the original meaning of a constitutional right or power, as revealed by the text and evidence of what the framers intended such text to mean. The noninterpretivist approach, . . . attaches only 'minimal weight' to the original understanding and intent of the framers and allows the judges a much freer hand in updating the meaning of constitutional rights and powers" (235). In the 1988

According to F. L. Morton, the contemporary trend in Canada veers on the side of the liberal judicial-activist approach:

> nothing has encouraged Charter litigation more than the Court's willing embrace of the non-interpretivist [read judicial activist here] approach to assigning meaning to Charter rights. The effective sundering of constitutional law from constitutional text has maximized the discretion of judges, thereby giving almost all interest groups at least the hope of winning a test case on the back of a plausible interpretation of a Charter right, regardless of its original or intended meaning. (301)

On the one hand, this judicial activist approach to law allows interest groups, lawyers, and even judges to "fill the Charter's empty phrases with collectivist content," speaking to the democratic notions of equality and liberty (Mandel 458), and to the liberation of those individuals whose interests and needs have traditionally not been met by Canadian political or legal systems. On the other hand, this approach also speaks to the way in which the Charter is, in practice, "vulnerable to political manipulation" (456).[22]

As Michael Mandel argues, the Charter's "vague" and "empty phrases," while pertaining ideally to neutrality, indirectly allow individuals, who have an investment in maintaining existing social power, the opportunity to use the Charter to forward their own political agendas (455). In this way, legalizing "the authority of the courts" does not simply, in a neutral democratic sense, shift responsibility from parliament to public opinion and judicial discretion (460); it also runs the risk of taking a distinctly "anti-

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Morgentaler Supreme Court Decision, the interpretivist approach is exemplified by McIntyre's argument, while the noninterpretivist approach is exemplified by Wilson's argument.

[22] For a full discussion of the legalization of politics, see Michael Mandel's *The Charter of Rights and the Legalization of Politics in Canada.*

liberal" and "anti-democratic form" that is potentially harmful to minority interests that exist outside the dominant social norm (458).[23]

The mobilization of the rights of women and foetuses around the issue of abortion provides a context for understanding how this new competitive, agonistic, and antagonistic Charter-based 'politics of rights' works to both liberate and contain meaning. Sidestepping parliamentary debate on the issue of abortion, both Morgentaler (pro-choice) and Borowski (pro-life) used the courts to argue for their own liberal interpretation of the Charter's section 7: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." While Morgentaler claimed that "the broad contours of 'life, liberty, and security of the persons . . .[and] the principles of fundamental justice" as outlined in section 7 pertained to women, Borowski claimed that these principles should be extended to the foetus (Morton 301).

In the public sphere and in the courtroom, however, the pro-choice faction was successful in using the central tenets of equality and justice in the Charter to create for women a "receptive legal and political environment" (296). By arguing for a concept of equality that privileged the liberal belief that human beings are rational, autonomous, "competent and mature," pro-choice supporters were able to argue that women's "liberty-rights" superseded the equality rights of the foetus (Sumner 48). Because the foetus was considered a non-rational, non-autonomous being, he/she/it was not

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[23] The legalization of politics indicates a change from British-style legalism, with its emphasis on legal principles and the separation of law and politics, to American-style judicial activism, which utilizes public opinion and refuses the separation of law and politics: the "work of judges and the work of legislators" (Morton 73). This difference is also conceived in respect to a British appellate-court conservatism and an American liberal activism.

considered a valid subject or person, and therefore was not entitled to the protective rights accorded legally viable persons.[24]

While this view provides a "plausible interpretation" of the section 15 equality clause (Morton 301), it is significant that the interpretation is in keeping with liberal values and a liberally-defined, consensual, normative concept of human personhood: a concept grounded in empirical, contingent, but nonetheless universal and knowable "truths," or facts about an "unchanging human nature" (Knopff and Morton 243).[25] The ability of judges and lawyers to redefine the meaning of equality in section 15 of the Charter according to these normative values and standards sets a precedent for thinking about how the Charter and the Courts of Law, as the "final arbiters" of the "limits of both state and individual authority" (Carver 2) become sites where, representatively and literally speaking, individuals can be reconstituted and regulated, either "called" into being as legally-valid persons or, conversely, excluded from "being."

According to Peter Gabel in "Reification in Legal Reasoning," the law grounds normative rational formulations, prescriptions, and truths such as these in a socially cohesive and "socially-apparent reality" (263) through a recourse to a normative political "we" (275), and through the construction of the law as a reasonable and abstract entity. While this construction creates the illusion of order and harmony by foregrounding the abstract political process that seeks to restore the "system's equilibrium" (268), it does so by disguising the fact that it is not the law *per se* that communicates and legitimates acceptable forms of personhood; rather, it is the lawyers and judges who act as the

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[24] In large part, Morgentaler's victory in the courts was dependent on the ability of feminists to mobilize public support for their version of "equality," as implied in liberal theory and the *Charter*.

[25] Ranier Knopff and F. L. Morton quote Thomas Sowell, when stressing that "judicial activism is the appropriate corollary of the left's 'unconstrained' vision of human 'nature'" (Sowell qtd in Knopff and Morton 242).

institutional agents of law, who legitimate who has rights and who, according to a normative criteria, should be considered a free and equal citizen. In this way, contentious issues appear to be resolved—and readdressed if need be in a court of appeal—in an efficient and 'neutral' atmosphere by a judge trained to work with facts, evidence, and abstract truths, rather than subjective emotions.

Many critical legal theorists, such as Peter Gabel and Michael Manning, emphasize, however, that in allowing lawyers and judges to "decide the important political questions of the day" there is a danger that their "political, and politically conscious, interventions," far from being neutral, legitimate and reinforce "agreed upon concept[s] or norms" (Morton 149). These judgements, which are always "inherently political and contingent," often mask biases and discriminations that rhetorically transform subjects into objects, "things," or "abstract parties," who can be dismissed, consciously or unconsciously, precisely to the extent to which they exist outside of what Gabel calls a timeless "presumptive norm" (270). For example, it is the abstract, universal, and knowable concept of equality within liberal morality that transforms "an historically contingent social norm"—the person as a rational, autonomous subject—"into a timeless fact about the world" (271). In turn, this "timeless fact" organizes the social perception of a normative human personhood into an ideal that, while having little to do with the varied and multi-faceted concrete lived experience of individuals, becomes, in the rhetoric, language, and practice of lawyers, judges, and even the general public, "descriptive of a concrete truth" that "everyone believes" and passively accepts as the norm (263).

While I think the focus on lawyers and judges is somewhat reductive, illogically confining the argument as it does *ad hominem,* "against the man" (Copi and Cohen 97),[26] I think it is important to analyse legal decisions not to critique the individual or group of individuals who make the arguments, but, rather, to examine how the arguments speak to or elide larger questions of liberal-democratic rule. To this end, I examine the decisions of the judges in the 1988 Morgentaler decision, asking how and why liberal-democratic society establishes a consensual morality that purports to value neutrality, and equality, while, at the same time, creating exclusionary concepts of "equal" personhood. How, one might ask, is the Charter used in the law courts not only to create "new rights," but also to exclude non-normative individuals from the rights that are supposed to pertain to all Canadians? Following this logic, it seems, then, essential to ask who this conflicting and exclusionary concept of morality serves, and in what way it compromises the lives or even the existence of those who are not able to or who do not want to conform to the status quo.

The 1988 Morgentaler Decision

The 1988 *Morgentaler, Smoling, and Scott v. The Queen* Supreme Court decision calls into question the liberal-democratic ideals of neutrality and equality, illustrating how Charter-based judgements are qualified not particularly by biases and

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[26] The logical fallacy, ad hominem, "translates into 'against the man" (Copi and Cohen 97); as is implied here, an argument of this nature is fallacious because it reduces the argument to the character of the individual opposing. Instead of focusing on the fallacies of the actual argument, the individual presenting the argument is attacked. He or she may be disparaged because of a perceived low intelligence, reasonableness or integrity. As Copi and Cohen state, however, "the personal character of an individual is logically irrelevant to the truth or falsehood of what that person says, or the correctness or incorrectness of that person's argument" (97).

discriminations, but by a reference to an ideal norm. This norm is present in the opposing opinions of Justice Bertha Wilson and Justice William McIntyre, which highlight the polarization of a judicial activist, liberal approach and a judicially conservative, democratic approach to the law.[27] These polarized perspectives speak not only to the controversy and tensions within the law itself concerning standards by which the law should abide, but also to the controversy within liberal democratic rule. While liberal notions of liberty and democratic notions of equality are political ideals, their application in law and in parliament is never neutral. In practice, these ideals are irreconcilable. However, it is significant that the predominantly liberal decision of Wilson and the predominantly democratic decision of McIntyre find a morally consensual middle ground in the "core" judgements of Justices Beetz and Estey, and Justices Dickson and Lamer. Mediating Wilson's and McIntyre's arguments these justices use McIntyre's conservative, procedural and democratic approach to agree with Wilson's liberal and activist argument, which states that section 251 of the Criminal Law is unconstitutional.[28]

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[27] In this decision, Justices Wilson, Beetz and Estey, Dickson and Lamer formed arguments that constituted the majority opinion in support of declaring s. 251of the Criminal Code unconstitutional. Dissenting were Justices McIntyre and La Forest, whose procedural argument measured the content of s. 251 against the "values expressed in the Charter" and found that the "courts must confine themselves to such democratic values as are clearly found and expressed in the Charter and refrain from imposing or creating other values not so based." They found that because "no right of abortion can be found in Canadian law or custom," s. 251 was not unconstitutional.

[28] Legislated after the 1969 amendments, Section 251 of the Criminal Code of Canada reads: (1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life; (2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years; (3) In this section, "means" includes a) the administration of a drug or other noxious thing; b) the use of an instrument, and c) manipulation of any kind; (4) Subsections (1) and (2) do not apply to a) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or b) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (a) for the purpose of carrying out her intention to procure her own miscarriage. If, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of

In doing this, they appear to equalize and liberate women's status as politically recognized normative Canadian citizens, while, in reality, they establish a hierarchy of liberal subjectivities. This hierarchy plays lip service to democratic ideals, while putting in place the parameters of an acceptable personhood, dependent upon the drawing of an imaginary line between normative and non-normative subjectivities. In keeping with Peter Gabel's statement that legal reasoning is a form of interpretation that limits consciousness (262), the 1988 decision works ultimately to institutionalise the boundaries of a legitimate rational Canadian citizenship by founding its decision on a normative and exclusionary narrative of legal personhood.

In her judgment, Justice Bertha Wilson, who presented a liberal, pro-choice argument in the 1988 decision, declared that section 251 of the Criminal Code—the section "prohibiting abortion except where carried out by [a] physician in [an] approved hospital following approval by [a] therapeutic abortion committee"—was unconstitutional. Taking a liberal individual human-rights perspective, she argues that "the legislative scheme set up in s. 251 of the Criminal Code not only violates a pregnant woman's right to security of the person but also the right to liberty as guaranteed by s. 7" of the Charter (*Morgentaler, Smoling, and Scott*). For Wilson, "the right to liberty" is founded on the protection of and the "respect for human dignity," which are, in turn, contingent on the guarantee that "every individual" should experience "a degree of personal autonomy over important decisions intimately affecting their private lives." In this respect, Wilson argues that women have the specific, constitutionally-protected right

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the committee and at a meeting of the committee at which the case of such female person has been reviewed, c) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and d) has caused a copy of such certificate to be given to the qualified medical practitioner.

to "make fundamental personal decisions" about their bodies and reproductive capabilities "without interference from the state:"

> This right is a critical component of the right to liberty and grants the individual a degree of autonomy in making decisions of fundamental personal importance. The decision of a woman to terminate her pregnancy falls within this class of protected decisions. It is a decision which has profound psychological, economic, and social consequences for the pregnant woman. Section 251 clearly violates this right to liberty since it takes the decision away from the woman and gives it to a committee.
>
> (*Morgentaler, Smoling, and Scott*)

From this perspective, woman's right to individual autonomy and liberty is dependent upon her rational ability to choose for herself the personal decisions that dictate the direction of her life.

This right to individual autonomy and liberty assumes, in a Rawlsian sense, that rational and moral persons can satisfy their own interests through a fair and impartial procedure of contracting. Through the establishment of these moral contracts, an equality is assumed that is "mutually advantageous for [all moral and rational] persons capable of mutual respect" (Reinders 114). Defining moral persons as those who are first, "capable of having (and are assumed to have) a conception of their good (as expressed in a rational plan of life); and second . . . capable of having (and are assumed to acquire) a sense of justice," Rawls establishes as a baseline for his liberal theory an "essentialist" understanding of human rationality (*Theory of Justice* 505). It is those beings who can make decisions who are capable of receiving justice and regulating it: "[taking] part in"

the liberal regulation of "common institutions and their conduct toward one another" (505). Although this theory assumes that persons who possess these qualities will extend "duties of compassion and humanity" to those "to whom justice is not owed," there is no guarantee that those who have "unequal moral [or rational] standing" will be accorded justice, since a consideration of these people is, according to Rawls, "outside the scope of a theory of justice" (512).

By extending the scope of Rawls' theory to include women and, specifically, a consideration of not only women's rationality, but also her body or embodied experience, Wilson's argument can be considered a bold, aggressive, and original attempt to secure a theory of justice that recognizes woman's status as a rational person and an embodied being, whose body demands certain rights. In doing this, Wilson utilizes the newly formed Charter-based politics of rights to go beyond the original neutral intent of the framers of the Charter, to enact a liberal judicial activism that demands that women have the choice to do what they want with their own bodies. This stance allows Wilson the freedom to (re)interpret and "extend the boundaries of existing rights and, if necessary, to strike down laws that infringe the newly discovered boundaries of these rights" (Morton 235).

Using her judgment to establish that the purpose of section 7 was to protect and promote not only the life, liberty and security of the person, but also "human dignity and worth," Wilson went beyond the Charter's original meaning in an attempt to establish a narrative whereby women's historical struggle for liberty and equal rights might be read in the context of the present struggle for women's reproductive rights and the rights they have to their own bodies. As rational and moral human beings, women should be entitled

not only to the legal status of persons, but, more specifically, to the right to control their own bodies and reproductive systems: "[women's] capacity to reproduce" must be "subject to [their] own control" (Wilson). While section 251 appears to offer women the chance to do this, its "seemingly neutral" stipulations, in practice result in unequal access to abortion. Women's autonomy, in questions concerning their own bodies and persons, is compromised when it is handed over to a committee that decides which women should or should not have access to abortion.

By extension, as Wilson argues, denying a woman access to abortion can compromise her emotional *and* physical health: "as regards the right to security of the person the present legislative scheme . . . subjects a pregnant woman to considerable emotional stress as well as unnecessary physical risk." Ultimately, Wilson argues that interfering with women's "right to liberty," as that liberty is read in relation to women's control of their own persons, bodies, and health, is not only a violation of women's "personal autonomy in decision making," but it constitutes, also, a "direct interference with [their] physical person." Because s. 251 treats women and their bodies as "a means to an end," depriving them of their "freedom of conscience," as outlined in section 2 of the Charter, it refuses women the "principles of fundamental justice," and, in doing so, "deprives them of their essential humanity." On the grounds that women's independence of body and mind is a prerequisite both for women's "essential humanity" and justice, Wilson inadvertently makes justice and women's essential humanity dependent upon their ability to be of sound and independent body and mind.

In other words, what is imagined here is not the experience of any woman's body, generalized to stand for the body of all women, but an essentialized woman's body that is

able in body and mind. This distinction is seen also in Henry Morgentaler's argument, as outlined in *Abortion and Contraception*. Under the broad rubric of psychological and medical reasons, Morgentaler argues that adolescents, single women, older women, poor women, depressed women, cognitively-disabled women, sick women, career-orientated women or women who are in danger of bringing a cognitively or physically disabled child into the world are making a responsible choice when they choose to have an abortion: "the most natural impulse would be to cancel it, i.e. to interrupt it" (46). This choice, Morgentaler argues, would be better for the woman, who may, in the case of an absent father for example, "have an extremely difficult time shouldering the responsibility of providing for a child all by herself" (38). It is also, he argues, better for the child, who will be "damaged" by the lack of a "loving, nurturing" environment in this situation (46), and better for society.

The assumption that non-normative women will run the risk of "damaging [their children's] development" (50-1) and, by extension, the future society, establishes a negative framework for thinking about certain "types' of women. By constructing these women as "types," Morgentaler de-emphasizes the individual woman's character and cultural experience—factors such as socio-economic and cultural realities that make them products of a history over which they have limited control—at the same time as he uses a strategic realist precept to emphasize women as the producers of history, the makers of a future criminal generation that threaten the "normal" ordered and civilized fabric of Canadian culture.

In doing this, Morgentaler, in a similar, but more elaborate way than Wilson, sets up a binary relationship for thinking about women, with good, responsible, able-bodied,

middle-class heterosexual women on one side and bad, irresponsible, disabled, poor, single, queer or bisexual women on the other. While "good" responsible women become stereotypes of caring, forward-thinking individuals, concerned only with the child's and the "family's well being"(101), "bad" or irresponsible women become stereotypes of uncaring, unthinking individuals, who are prone to "ignorance, carelessness and risk-taking" (31), and who care "little about what happens to children after they are born" (124).[29] Although this binary can only be fully understood in respect to the ideological needs of a specific socio-political, cultural, and historical juncture, and its strategic need to establish one form of representation as authentic or true and another as inauthentic or false, it nevertheless throws into question Morgentaler's liberatory agenda.[30]

Similarly, Justice Wilson's call for women's liberty is thrown into question by her attempt to liberate women according to their positioning within the bounds of an always-already established rational and able-bodied definition of liberal human personhood. By framing women not only with abstract talk about women's rights, but also with a concrete visual image of women's embodied, lived experience, as that experience is interfered with by law, Wilson is effective in establishing that women are entitled to the rights accorded other rational, moral, able-bodied, and healthy persons. Ultimately, this means

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[29] It is interesting that in the case of absent fathers or, in Morgentaler's terms, "potential fathers," Morgentaler does not question the responsibility of fathers to their children. Rather, he argues that the responsibility falls "naturally" on women, whose only solution to the difficult prospect of raising a child on her own is to abort the child.

[30] This is not to imply that women were passive recipients, blind to Morgentaler's agenda. Many of them were not comfortable with the leading role that Morgentaler played in the fight to legalize abortion. Most of them recognized, however, that Morgentaler added credence to women's "long and arduous struggle for reproductive freedom" (Dunphy 11). Morgentaler offered a public face to the abortion controversy; as a doctor, who campaigned for the legalization of abortion out of a concern for his patients, he gave the women's movement the publicly-endorsed authority they needed to change the law. Under his leadership, abortion was no longer simply a medical or a legal issue, "confined to the annual business meetings of the Canadian bar and medical associations," abortion was a personal issue that united or divided *all* Canadians from *all* walks of life in relation to their core beliefs about the value of human life, who accords this value, and to what (Morton 71).

that Wilson's judicial activism rhetorically recreates an "essentialist" vision of humanity: one that is inclusive of women, and their ability to act on their moral reasoning and able-bodied subjectivity.

In charge of this vision, and the restoration of women to this vision, is, as Morgentaler recognizes, the courts, and judges in particular, who become the final arbiters and protectors of constitutionally entrenched rights and liberties. Acknowledging that the bodies and the rights of women have been violated, and that this interference deprives women of their essential humanity, it is, then, the court's responsibility to restore to women their humanity, as that humanity is read in liberal terms according to the rights which should be granted to all rational, autonomous, able-bodied persons.

At the other end of the political legal spectrum, contrasting with Justice Bertha Wilson's liberal perspective, is Justice McIntyre's dissenting opinion. This opinion can be seen as an attempt to "minimize judicial discretion by limiting and narrowing Charter rights "to their 'original meaning,' as disclosed . . . by the intent of the framers" (Morton 305).[31] Unlike Wilson, Justice McIntyre did not explicitly state a preference for either the rights of women or the rights of foetuses in his judgement. Rather, he was concerned, in Morton and Knopff's words, "to demonstrate the dangers of judicial attempts to enact the judges' views of enlightened public policy in the name of constitutional

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[31] Ironically, this approach was used to deny women the rights to personhood in the 1928 Person's case. As F. L. Morton argued, in response to women's petition for legal personhood, the Supreme Court of Canada stated, "the words of the constitution must be interpreted to mean what they meant at the time of their enactment. Since women neither voted nor held political office in 1867, certainly the framers of the constitution did not intend them to be eligible for appointment to the Senate! Legislative enactment, not judicial decision, was the only proper way to 'update' the Senate appointment provision" (136). Thankfully, this decision was overturned on appeal, when Lord Sankey made it clear that "The British North America Act . . . Like all written constitutions, . . . has been subject to development through usage and convention. Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation" (Sankey qtd in Morton 136-7).

interpretation" (269). For McIntyre, the function of the courts of law is not to use the Charter to promote or legitimate reform, which could allow minority movements to bypass the "slow workings of the political process," but, rather, to "confine themselves to such democratic values as are clearly found and expressed in the Charter and refrain from imposing or creating other values not so based" (*Morgentaler, Smoling and Scott*).

In relation to the abortion debate, McIntyre argues that the responsibility of the courts is "not to solve or seek to solve . . . the abortion issue," but to examine the procedural flaws in section 251 to determine whether it violates any "clearly expressed" rights outlined in the Charter.[32] McIntyre wrote that "no right of abortion can be found in Canadian law or custom or tradition and the Charter including s.7 does not create any further right." Consequently, McIntyre disagreed with Wilson's argument that section 251 was unconstitutional. As McIntyre argued, the framers' deliberate exclusion of abortion in the framing of the Charter means that any attempt to legalize abortion is indicative of the court's attempt to "[exceed] its authority." The courts should not decide the Morgentaler case on a matter of opinion, according to "how many judges may favour pro-choice or pro-life;" rather, these contentious political issues should be decided procedurally, through a close reading of the rights clearly expressed in the Charter, and through a consideration of the framers' original neutral stance on the issue of abortion. To add to this, McIntyre insisted, "it is not for judges to 'second guess' Parliament's

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[32] According to F. L. Morton, the "school of thought" known as "judicial self-restraint, takes very seriously the anti-democratic problem of judicial review. A judge committed to self-restraint is reluctant to strike down legislation and tries to minimize this problem by deferring to legislative judgment unless there is a "clear mistake" (234). Opposing this school of thought is the position of the "judicial activist," who "is more willing to accept the invitation to extend the boundaries of existing rights and, if necessary, to strike down laws that infringe the newly discovered boundaries of these rights" (235). Justice McIntyre can be seen as a "textbook example of judicial self-restraint," while Justice Wilson's approach reflects, accurately, the approach of the judicial activist (234). See also footnote 21.

choices in these matters:" any "change in the abortion law" is not for the courts, but for "Parliament to make" (Morton and Knopff 270).

> This is not because Parliament can claim all wisdom and knowledge but simply because Parliament is elected for that purpose in a free democracy and, in addition, has the facilities—the exposure to public opinion and information—as well as the political power to make effective its decisions.
>
> (*Morgentaler, Smoling and Scott*).

Pointing to the opposite ends of the political-judicial spectrum, the judgements of Wilson and McIntyre reflect contradictory liberal-democratic impulses. While Wilson's liberal-activist reading focuses on individual rights and the rights of the courts to decide public policy, McIntyre's judgement reflects a democratic sensibility, concerned not so much with individual rights, but with the democratic impulse to "[safeguard] internal peace" (Morton 3) by maintaining a historically consistent equality and order. This democratic sensibility has its antecedents in maintaining dominant power structures, in perpetuating the status quo. However, its tendency to play it safe, reading the Charter in relation to the intent of the original framers, elides the possibility of cultural change or progression. In turn, McIntyre's opinion, while supporting the ability of Parliament to enact laws based on a "neutral" assessment of contemporary competing values, elides the possibility that these competing values might be influenced by the dominant relations of power embedded in ideal and fixed notions of the democratic state.[33]

Although the liberal-democratic distinction, exemplified by the arguments of Wilson and McIntyre, is complicated by the historical and contemporary blurring of their

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[33] Here I am referring to the way in which a strictly procedural law hearkens back to pre-Charter days when minority or gender-specific rights were not an issue.

respective logics, in which "liberalism [is] democratized and democracy [is] liberalized" (Mouffe 3), the distinction between the two perspectives is important for an understanding of the "symbolic framework" within which liberal-democratic rule is exercised (2). In one way, as Chantal Mouffe argues, this liberal-democratic tension keeps open the field of "democratic contestation" (10), enabling a (re)negotiation of conflicting, individually constitutive liberal-democratic values; in another way, however, this openness is always and necessarily confined by a normative closure, as that norm is constructed repeatedly through narrative interpretations and readings of the laws that, in a circular fashion, determine the normative meaning systems and the internal and external constraints set by them.

In the 1988 Morgentaler decision, the Beetz and Estey, and Dickson and Lamer judgements provide closure by establishing a moral consensus. This consensus attempts to resolve the dispute between pro-life and pro-choice parties, and, concomitantly, the dispute between the conflicting perspectives of Wilson and McIntyre. By using McIntyre's interpretive approach to perform a conservative, objective and "neutral" procedural reading of the Charter, they appear to keep open, even if in a conservative sense, the field of democratic contestation. Ultimately, however, they establish the hegemony of Wilson's liberal, non-interpretive or judicial-activist perspective. In this way, they resolve the problem that the foetus' difference represents to a normative liberal democracy by restoring the "disrupted communion" of validated normative human persons to their "lawful state" (276).

In this conservative attempt to resignify women's inclusion, Beetz and Estey, and Dickson and Lamer argued that section 251 infringed the "guarantee to [the] security of

the person," as mandated in section 7 of the *Canadian Charter of Rights and Freedoms.* Also, it violated section 1 in that it failed to meet the proportionality test that guarantees the individual his or her rights and freedoms in accordance with "reasonable limits prescribed by law" and "demonstrably justified in a free and democratic society" (Charter). In reference to section 7, Dickson and Lamer noted that while section 251 was originally designed by Parliament to "balance the competing interests of the life and the health of the pregnant woman and the interests of the foetus," the "procedures established to implement the policy of section 251" offer only an "illusory defence" to many women, who find that the "procedural flaw[s]" of section 251 are not only "manifestly unfair," but put the life and health of the mother at risk (Dickson and Lamer *Morgentaler, Smoling and Scott*). Because section 251 of the Criminal Code "takes the decision away from the woman at all stages of her pregnancy," it violates not only woman's constitutionally protected right under section 7 of the Charter, but also her democratically established right to liberty and freedom of choice through its failure to supply an adequate definition of health, through its failure to articulate a "clear legal standard to be applied by the committee", and through its failure to provide adequate access to abortion.

Concurring with the Dickson and Lamer judgments, Justices Beetz and Estey diverged from McIntyre's procedural attempt to compare s. 251 to the democratic values expressed in the Charter and to refuse to go beyond the Charter, by arguing that "the procedural requirements of s. 251 of the Criminal Code are . . . manifestly unfair." Not only do they "significantly [delay] a pregnant woman access to medical treatment," but, according to Beetz and Estey, they also

> result in additional dangers to her health and thereby deprive her of her right to

> security of the person. These additional dangers resulting from the delay included increased risk of post-operative complications, and the risk that the pregnant woman would require more dangerous means of procuring a miscarriage because of the delay. Further, the delay that a pregnant woman must endure before she receives treatment of any kind results in psychological trauma. To force a woman under threat of criminal sanction to wait for medical treatment when she knows that her pregnancy represents a danger to her life or health is a violation of her right to security of the person.
>
> (*Morgentaler, Smoling and Scott)*

Pointing out that "the deprivation of this right to security does not accord with the principles of fundamental justice," Beetz and Estey ultimately ruled that while the "primary objective of s. 251 of the Criminal Code is the protection of the foetus, an objective which relates to pressing and substantial concerns in a free and democratic society," this protection does not supersede the belief that s. 251 is not a reasonable limit in respect to women's rights.

Adhering to and reflecting an "ambivalent and cautious use of the Court's new power" under the Charter (Morton 236), the middle ground of Beetz and Estey, Dickson, and Lamer appears, on the one hand, to resolve what Mouffe calls the "contaminating tension" between democratic and liberal perspectives while, on the other hand, it functions to shape and manage a specific form of pluralistic liberalism relevant to the secular requirements for women's timely liberation, and for the recognition that women, as a group, constitute, within democratic, liberal Canadian society, a "recognized" moral community.

Here, Judith Butler's argument that a normative pre-requisite of human personhood is constructed, regularized, and sanctioned by the "constituting power of the law" becomes relevant (*Bodies That Matter* 106). It is, Butler argues, the law's ability to reconstitute and reiterate normative prescriptions through "a practice of *re*signification" that enables it to "bring into being that which it legally enjoins and protects" (107).[34] While Butler refers specifically to sexed norms in her analysis, arguing that the law reproduces "sexed positions" through "citational practices instituted within the juridical domain—a domain of constitutive constraints" (108)—her theory can be applied also to an analysis of gendered subjectivity. In this way, Wilson's decision and the consensus of Beetz, Estey, Dickson, and Lamer, which establishes a recognition of women as autonomous rights-bearing persons, speaks not so much of the ability of the law to legitimate and regulate subjectivities according to normative socio-political standards, but more to its ability to resignify and reconstitute or "bring into being" women's inclusion into the normative political arena.[35]

However, while this decision figures women in positive terms as legal subjects, the abstract political process, in which 'we' create the laws which govern 'us', ultimately recreates women as abstract individuals, able to meet the rational requirements of normative autonomous subjectivity. This openness to women's inclusion is qualified by a normative closure that establishes the limits and boundaries of their liberal-democratic inclusion, negotiating and "temporarily stabilizing" difference by drawing attention to

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[34] Butler's theory of legal resignification can be compared to the "living tree" metaphor in law. This theory allows judges to maintain the authority of the law by "[adapting] constitutional language to new social, economic, and scientific change, thereby keeping the constitution in tune with the times" (Morton 137).

[35] In this way, the 1988 Morgentaler decision can be read as a necessary corollary to the 1929 Persons' case in that it extended women's legal rights in the public domain to include women's right to control her own body and reproductive rights.

"who belongs to the demos" (Mouffe 4), as that demos is conceived through a concomitant naturalization of the status quo, and through the promotion of a liberal-democratic moral consensus (5).

Interestingly, although this inclusion would appear to universally privilege women as rational, autonomous human beings, within this rhetoric women themselves are structured in a hierarchical relationship to each other, according to their perceived ability to embody, actualise, and pass on to their offspring the rational, autonomous, and able-bodied normative qualities required of "good" liberal subjects.[36] To reiterate, speaking as a medical and moral authority on the subject of abortion, Henry Morgentaler reasons that some women should recognize that "an abortion is in [their] own best interest[s]" (*Abortion and Contraception* 49). Recognizing the consequences to themselves, their as yet unborn children, and society, women who are either too young, too old, too poor or unmarried or disabled should, in short, abort their babies. While idealistically all women, as rational, autonomous beings, have the freedom of "choice," in reality some women, especially those who are not financially secure, young, able-bodied, "healthy or emotionally stable" (Morgentaler *Abortion and Contraception* 39), have restricted choices, maybe having their choices made for them by a paternalistic medical establishment or by what Henry Morgentaler calls "enlightened, responsible people" (145).

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[36] In many ways, removing the legal barriers to abortion ultimately disempowered women, containing them in relation to authoritative institutions, and institutional agents, such as doctors. Encased in a rhetoric that privileges the institutional reorganization of medicine that works concomitantly with women's right to choose, women and women's health become part of the larger project of maintaining the norm. This new form of control, took the power from women and women's collectives, such as the Jane collective in the United States, and put it firmly back in the hands of those in authority. From this perspective, the liberation of individual autonomy and personal power is less about the abdication of state power than it is about establishing "techniques of power" that use the network of social and economic institutions, relations and narratives to subjugate individuals at the same time as it holds out the promise of freedom (Foucault *History of Sexuality* 109).

In this respect, affirming that each woman has the absolute right to choose abortion pre-empts the larger question about who ultimately has control over abortion and/or women's choices. It also calls into question the notion of liberal neutrality by highlighting both the normative project of proliferating middle-class subjectivities—those able to be in "a good [heterosexual] relationship that would include the joint care of children in marriage" (38)—and the social and political project of restricting "the reproductive freedom of those who . . . 'procreate blindly and indiscriminately'," creating in their "unwanted" or "unloved" offspring, potentially unmanageable subjectivities (Watters qtd in McDonnell 96-7), who could, in Henry Morgentaler's logic, grow up to "become juvenile delinquents and criminals who kill, rape, and maim" (Morgentaler "The Moral Case for Abortion.").

As this uneven and oftentimes unequal course of women's liberation suggests, while these liberal and democratic discourses or logics can inform each other in productive ways, potentially creating "the very condition of possibility for a pluralist form of human coexistence in which rights can exist *and* be exercised, in which freedom and equality can somehow manage to coexist," the tendency to eliminate the tension or the constitutive antagonism between democratic and liberal values by proposing what appears to be a consensual solution—a solution that resolves the problem according to abstract ideals of liberty or equality that purport to be for the good of all—is, in some cases, ultimately non-productive and, paradoxically, even non-democratic or non-liberal (Mouffe 10-11).[37] In Mouffe's terms, the attempt to create a "'rational consensus'" (7), a

[37] Mouffe points out how the ideal of a modern liberal democracy is based on the "realization of a 'rational consensus' and on the concomitant illusion that left and right have ceased to be pertinent categories for democratic politics" (7). The blurring of these boundaries is seen in contemporary neo-liberal politics,

"consensus at the centre," ultimately hides the fact that the left has given up their traditional struggle for freedom and equality, resulting in a scenario where the demands of those "excluded from their political and social priorities" are negated or refused consideration (6).[38]

In other words, the respective procedural and moral grounds—which claim that section 251 violates "reasonable limits" of law, as that law is written in relation to an equitable and protective democratic society and as it is written in relation to an "essential humanity" and its inherent freedoms—reveal that equality and liberty are reconcilable in legal reasoning only when read in abstract reference to a legally-endorsed, normative "we" that refuses consideration of "an invisible but ever-present 'they'" (Scheppele 2078). From this perspective, "'they' are the outsiders, the ones who do not believe, who are not included, who do not understand, who are beyond the boundaries of community" (2078). In relation to the Morgentaler decision, six of the seven judges were able to reach an agreement about the illegality of section 251 at least in part because they were able to differentiate between the rights of women and the rights of the unborn, and because, in establishing, at least in theory, the universal right of women to be included in the normal, rational "we", they were able to ignore the implications of their decision for an "unessential" humanity, a humanity that lies outside of the recognized equitable and liberating framework of a liberal-democratic discourse.

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which "pretends to be located 'beyond left and right'" in its attempt to create a " 'consensus at the centre'" (6).

[38] According to Mouffe, this attempt to eliminate conflict between democratic and liberal values allows "right-wing populist parties" to "occupy the terrain of contestation deserted by the left" (7). Because they are the "only ones denouncing the 'consensus at the centre'," they are able to persuade the working classes and oppressed minorities that "their interests are better defended" by "the demagogues of the right" (7). It is this movement that Mouffe sees as "jeopardizing the future of democracy" (7).

This elision clearly applies to the foetus. Although all seven justices explicitly acknowledged that the purpose of s. 251 was designed to protect the foetus, recognizing, as they did so, the legal interests of the state in protecting the life of the unborn child, they disagreed "on when and how" this protection should occur (Morton 232). While McIntyre indirectly addressed the interests of the foetus by declaring section 251 of the criminal code to be unconstitutional, Wilson advocated a "developmental approach," suggesting that the point at which the foetus should be protected lies "somewhere in the second trimester" (Knopff and Morton 273), and Beetz and Estey argued that "the state's interest in protecting potential human life exists throughout pregnancy (273). Most important for this argument, however, is that although these justices left open the potential for Parliament to endorse "a similar law with an improved procedural framework" that would offer some protection to the foetus (274),[39] their consensual declaration that section 251 of the Criminal Law was unconstitutional because it infringed the rights of women as outlined in the Charter is only made possible by refusing the rights of the foetus to life. In other words, the privileging of "Wilson's solo position on a woman's liberty to decide for herself" (289), and the resulting policy vacuum which left Canada with "no criminal law regulation of abortion at all" (22), ultimately endorses not only women's rights and abortion as "established public policy" (290), but also, indirectly, a hegemonic model of human personhood. This model denies certain excluded 'others' not only the benefits accorded to liberal democratic "persons," but also, at a fundamental level, the right to life.

[39] To date, Parliament has not addressed this issue, preferring to leave "hot topics," such as this, to the Courts.

Abortion and the Construction of Disability

While on one level the complex and multifarious interpretations employed in the abortion controversy reflected deep philosophical fissures in Canadian society and culture in relation to what constitutes legal personhood or citizenship, it also, on another level, established a logical basis for judging Canadian citizens in hierarchical relationship to one another, and to an imaginary "ideal" norm that dictates who and what constitutes a legally viable Canadian person or citizen. This has ramifications for a larger debate that, while accepting women's right to have an abortion, also recognizes that this right has specific negative implications for non-normative identities—those, including women, who are considered non-useful, dependent, unfit, and/or working class—and for people with disabilities in particular.

Indicating a crisis in meaning that attempts to reformulate perceptions of the good by renegotiating "acceptable" and "unacceptable" identities and subjectivities within the nation, the abortion controversy revises earlier fears about an out-of-control population increase by repeating arguments about "quantity" within a "new" rhetoric that privileges "quality:"

> Respect for life is a hollow slogan if it ignores the *quality* of life. At the present time, *overpopulation* has become one of the major problems facing the human race and it causes untold misery for millions of people. It is only by limiting population growth that we may be able to ensure that every child born is given his rightful opportunity to grow, prosper, and develop his humanity as fully as possible.

(Morgentaler *Abortion and Contraception* 134 my italics)

Quality, which gets translated as ability in this rhetoric—growing, prospering and developing—becomes a national narrative that is meaningfully and comprehensively regulated not through an overt eugenics agenda, but through an agenda that balances the liberation of women and their right to control their own fertility with a specific form of control and surveillance that gives credence to useful, self-reliant, fit, middle-class bodies at the expense of those considered non-useful, dependent, unfit, working class, and cognitively or physically dis-abled.

In terms of disability, both sides to the abortion debate show little concern with the moral problems associated with aborting foetuses with disabilities. Borowski's pro-life argument that the foetus has all the developing attributes of "normal" human beings and Morgentaler's pro-choice assumption that "normal" human foetuses are corrupted by their environment both ignore the way in which disability complicates this argument. In this respect, I would argue that public outrage around the issue of abortion is based on the assumption that it is "normal" foetuses that are being aborted. The absence of any consideration of disability in this case speaks to the underlying and hidden indifference, animosity and violence in Canadian culture, in language and in physical practice, towards those who are considered "abnormal" and who are, consequently, considered abortion material.

Maybe it is not surprising then that preceding the actual physical "elimination of defective organisms"—a process considered necessary to the protection and survival of "the human species" because it ensures that "only the most robust and healthy" are born,

while "the defective ones are eliminated" or sacrificed for the greater social good (Morgentaler 146-7)—is the figurative elimination of these non-normative or unformed persons, who are excised from "normal" moral vision first in language. Specifically, in these abortion debates it is possible to see that disability as a metaphor is used as "a means of strengthening an artificial "norm" by marking out what is "abnormal" (Dolmage 155). Imposing a structure on real life by creating a shared understanding about what it means to be disabled, "the normative says that the 'abnormal' cannot experience the 'normal' world, while also saying that the normative should define 'abnormal' experience" (156).

Projecting an "inhuman" humanity on the foetus, Morgentaler, for example, visually appropriates the way in which unformed humanity is seen. By metaphorically comparing the foetus to a "biological accident" (Morgentaler *Abortion and Contraception* 46, 101), and by arguing that the foetus is no more a baby than "an acorn [is] already an oak, a seed a rose, a blueprint a house," Morgentaler figuratively eliminates the non-normative or unformed person from a "normal" moral vision. This tactic dehumanizes the foetus and making abortion acceptable, even desirable. Because these metaphorical assumptions are used unconsciously, "largely without being noticed" they "shape our understanding of our everyday world" and potentially "have enormous social consequences" (Lakoff "Simple Framing").

In attempting to establish the grounds of valid moral personhood, one of Morgentaler's central metaphors involves comparing a foetus to a house:

> For it to be a house it needs perhaps 100,000 bricks, an internal organization, plumbing, and so on. If we lay down only one or two or fifty bricks, can we say

> that what is there is already a house? Obviously not. . . . Anyone calling a few bricks or even a foundation a house would be considered completely divorced from reality. What can one say of people who seriously believe that one or even a hundred cells constitute a baby, a human being? (144)

Morgentaler leaves this last question open, so that the reader can fill in the blank. It is significant, however, that his simple analogy positions the reader both as someone who does not understand the argument and as someone who implicitly understands the "open-ended category of knowledge schemas" presented here: the foetus is a baby who is one brick too short of being a 'fully-formed' and 'fully-functional' human being (Lakoff "Simple Framing"). Using medical and linguistic authority here, Morgentaler dehumanises the living foetus, forcing the uninformed reader to think of it as a 'thing' that can, if the structure is faulty, be disposed of (*Abortion and Contraception* 144).

Disability, here, becomes the metaphor for all unacceptable subjectivities in that as a concept it stands as the extreme example or model of the lack of consciousness attributed to all non-rational beings. Existing outside of a "normal" frame of understanding, people with cognitive or physical disabilities represent a threat to the "human species," who should be protected against the "birth of individuals whose potential for fulfilment is limited" (151). According to Morgentaler, these limited, "potential people" will not have a "worthwhile life" (150); moreover, if they are allowed to live, they will severely limit and compromise the lives of others: "women choosing abortion are preventing the birth of severely deformed children, thereby protecting not only their families but the human species as well" (150). Ultimately, however, ending the lives of these limited "potential people" is justified not only as being for their own good

or for the good of others, but because, when considering the human status of a non-conscious foetus, whether it is physically or mentally disabled or whether it might become socially disabled later in life, it is possible to say that, biologically, "we are not in the presence of a human being" (143).[40]

This view of abortion makes visible the unequal power relations that enable "one dominant, normate discourse to create a normalized body that then constructs a world, metaphorically, in its image" (Dolmage 156).[41] The metaphorical construction of disability defines 'abnormal' experience in ways that refuse the 'abnormal' a visibility outside of commonly used metaphorical labels and stereotypical definitions. Reductively, while the foetus *is* an "appendage" or a "mass of dependent protoplasm" (Hitchens 20), the child who has cerebral palsy *is* a cripple or a retard. Reducing individuals to labels or to the sum of their dysfunctional parts perpetuates and fixes in language and in reality negative perceptions of people with disabilities. These perceptions serve the able-bodied in that they rationalize 'normal' existence at the same time as they mystify and ultimately fix non-normative experience in negative paradigms: disabled people, for example, are defined abstractly by their pain and suffering to the point where they become it. Their experience is appropriated and contained within a violent visual prosthetics that prescribe ways of seeing that make the real-life experiences of the

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[40] Joseph Fletcher also states that "The only possible moral test of these rival views about abortion lies in their consequences. When beliefs or non-empirical opinions, neither of them being verifiable, contradict or clash with each other, the only possible way to choose between them morally is in terms of their consequences if they are followed out logically in practice. The one which results in greater good for people is the correct one. On this basis it is an open and shut case for abortion, obvious and overwhelming; it can be justified very often, sometimes for reasons of human health, sometimes for reasons of human happiness. . . . If we adopt the sensible view that a foetus is not a person, there is only one reasonable policy, and that is to put an end to compulsory pregnancy" (qtd in Morgentaler 152).

[41] The "normate" is Rosemarie Garland Thomson's term. She defines it in *Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature:* "the term *normate* usefully designates the social figure through which people can represent themselves as definitive human beings. Normate, then, is the constructed identity of those who, by way of the bodily configurations and cultural capital they assume, can step into a position of authority and wield the power it grants them" (8).

disabled politically, socially, and culturally invisible. It is this invisibility that is tied, inextricably, to their perceived inhumanity. Once they are perceived as inhuman, they are figuratively and literally exorcised from the "normal" vision.

According to Foucault, it is the clinical, all-encompassing gaze, operating as a tactic of power that enables a normative cultural blindness to these non-normative individuals in their complexity. The extent to which this "calculated" gaze "traces the limit that will define difference in relation to all other differences, the external frontier of the abnormal" (*Discipline and Punish* 177, 183), is also the extent to which "it establishes over individuals a visibility through with one differentiates and judges them" (184). In other words, while disciplinary power is "exercised through its invisibility," it also imposes on subjects "a compulsory visibility" (187). Tactically, the gaze uses language and visual figures to associate the "useful and intelligible body" with life and the non-useful and non-intelligible body with death. In that figurative or metaphorical language "takes" a picture of the individual, fixing him or her in a still frame of what he or she negatively represents, it not only negates the individual's real life experience, but negates the individual's life, and speaks succinctly of his or her death. In framing life with a perception of death, indeed in creating a "perception of death in life" (*Birth of the Clinic* 171), the gaze ultimately "authorizes a withdrawal that measures the moral distance involved" (*Birth of the Clinic* 164) between the "normal" and the "abnormal."

The unequal power relations as embodied in the notion of the "normalizing gaze" become visible in modern bioethical arguments about abortion (*Discipline and Punish* 184). Peter Singer's analysis of abortion in *Rethinking Life and Death,* does not focus on

class like Morgentaler, but on disability. Drawing on the "thalidomide tragedy" (91),[42] the selective non-treatment of premature or disabled infants, and questions of overpopulation, Singer argues from his normative perspective that not "all human life is equally sacrosanct" (86). For Singer, "the ability to choose, . . . is what gives human beings basic rights, including a right to life" (86). This thinking denies foetuses, the infant, the young child, and the cognitively disabled adult the right to life. What Singer proposes, then, is a culture that acknowledges Foucault's notion that contemporary life is encompassed and defined by death. Because the determinant of death is ambiguous—varying from "irreversible coma," and a "permanent loss of intellect" (26) to "a persistent vegetative state"—it is possible, according to Singer, to claim that there is a type of living death, where people who are unconscious are, in effect, already dead. Singer argues, then, for a "new definition of death" (25): one that allows death to be defined in life, if that life is unconscious. In Singer's terms, this will help distinguish between those who are salvageable (breathing and conscious) and those who are disposable ("breathing but dead" (42))(25), between those who are "a waste of organs" and "a great burden . . . on their families, the hospitals, and the community" (27) and those who are worth saving.

It is this culture of death that I address in the next chapter. By reading the Sue Rodriguez case and the *Special Senate Debate on Euthanasia and Assisted Suicide*, I argue that the social acceptance of euthanasia, although couched within a rhetoric of

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[42] The justification of legalized abortion for the prevention of physical or mental injuries was validated in the minds of many Canadians by the thalidomide scare. As Alphonse de Valk in *Morality and Law in Canadian Politics* states, the thalidomide crisis not only "revealed that many people were quite prepared to allow and accept abortion," but "it became clear that they were prepared to do so on the mere *possibility* of a baby being born seriously deformed" (13). While this suggestion was opposed in some quarters—the Chairman of the Canadian Bar Association, for example, did not support this idea, stating that it was prompted by the "horror expressed for deformations such as found in the thalidomide babies" (14)—it was embraced by many who might, while opposing the regulation of sex selection, be prepared to consider it acceptable to dispose of foetuses who have the potential to be born with disabilities.

human rights and within an empathetic response to individual pain and suffering, constitutes a slide from a specific eugenics agenda to death-making ideology that is simply there like life itself, working in the shadows of a liberal democracy to instigate a nationwide debate about the value of human life.

Implications and Conclusions

To return to the abortion debate, however, it is accurate to say, as John A. Mitchell and Scott B. Rae emphasize, that "at the root of all discussion regarding human rights is the fundamental question" of personhood: "Who counts as a human person?" and, more specifically in terms of the abortion debate, "When does human personhood begin and end?" (19). In the courts of law, what it means to be a human person informs all "ethical decision making concerning human rights at the edges of life" (19).[43] Likewise, because the law or, more specifically, judicial opinion, informs and reaffirms, in the realm of thought and language, the normative, liberal status quo, it also ultimately

[43] Humanity and personhood are two different terms; while, in medical terms, "a zygote is the beginning of a new human being" (Moore and Persaud 2), personhood, as previously mentioned, refers to an individual's legal status. From this reasoning, a foetus can be considered human, or because it is not a "separate individual" be considered to have human qualities (Pro-Choice Action Network), but it is not entitled to the rights accorded persons. While the moment when the individual becomes a rights-bearing person is debatable—Butler and Walbert, for example, in their medical ethics text entitled *Abortion, Medicine and the Law,* discuss personhood in terms of *Roe vs Wade:* "we must decide at what point in the development of that life, we, as a society, will confer rights of personhood, . . . The competing developmental points at which society might grant personhood include fertilization of the ovum, implantation of the blastocyst, viability of the fetus (ability to survive outside the uterus), birth, or the passage of some period following birth" (18)—it is generally believed that an individual becomes a right-bearing person when he or she is considered to be a rational, autonomous individual. Interestingly, Peter Singer, a professor of bioethics at Princeton University, advocates that personhood should be denied to all human beings who lack the characteristics of "rationality, autonomy, and self-consciousness" (*Practical Ethics* 182). Arguing that it is morally and ethically acceptable to kill these non-conscious human beings, he argues that killing them "cannot be equated with killing *normal* human beings, or any other self-conscious human beings" (182 my italics).

(re)affirms a liberal ethics for determining what it means to be a rational, autonomous, rights-bearing human person.

In the Morgentaler decision, women's autonomy is reified in law as if women's autonomy is not a legally, socially and historically constructed requirement, but a "fact" of human nature. As Henry Morgentaler insisted in his testimony at this trial, not to acknowledge women's autonomy is to deny them not only their health, but their life (*Morgentaler, Smoling and Scott*). In affirming women's autonomy, the normalizing tendency within the system, which is apprehended as the movement of a normative political "we," confirms the universalising and naturalizing tendency of the legal system to encode its operations through the "binary schematisation of legal/illegal" and through the negative or positive formulation and reification of abstractly-defined acceptable or unacceptable legal subjects (Luhmann 25).

Within the legal and liberal binary construction of women versus foetus, the foetus, as a non-rational, non-autonomous being was constructed in the courts of law in terms of its unacceptable status as a non-person. Despite Borowski's attempt to construct the foetus as a human being, the belief that women's autonomy rights exceeded the autonomy rights of their foetuses meant that the rights of the foetus were negated. Moreover, given that the standard for legal human personhood rested upon the ability of the individual to reason, not even science could prove that the foetus had a right to life.

For example, in the 1983 Borowski "trial for life," when issues of the foetuses' human status or foetal human personhood became a central issue, Borowski and his lawyer, Morris Schumiatcher, attempted to use the "facts" of modern science to reform the law, proving that the foetus is entitled to rights accorded to persons (Morton 131). To

this end, they used as evidence the opinions of experts such as Dr. William Liley, Dr. Jerome Lejeune, "the world famous geneticist from Paris," and Dr. Bernard Nathanson, a reformed abortionist (143). All of these doctors testified to the scientific presence of a human being in the foetus; however, despite their attempt to "[break] down the walls of scientific evidence about the unborn" by listing genetic evidence, and technologies such as "real time ultrasound, electronic foetal heart monitoring, immunochemistry, fetoscopy, and hysteroscopy," none of these doctors was able to prove that the foetus is a human person, able to receive the moral and legal rights accorded to legally-recognised persons (146). The failure or the inability of these "expert" authorities to convince the courts that human personhood begins with or shortly after conception meant that the issue of foetal personhood was ultimately discarded (Beckwith 34).[44]

As Judge Matheson stated in the 1983 Borowski trial, "the juridical status of developing humans has historically depended on their capacity for a separate and independent existence." Because the pro-life faction was unable to argue that the foetus is a rational, autonomous, rights-bearing person in the eyes of the law, the state's responsibility, as Judge Matheson reiterated, must be geared to protect the constitutional rights of the pregnant woman: the foetus' status as "potential" life does not outweigh the "actual" life of the woman, and her right to control her own body.

The construction of the foetus in the courts of law as "potential" life or as a non-person is evidence of the way in which, as Gabel argues, concepts "reified in ordinary language take on a meaning that ascribes ordinary language agency" (270). In other words, it is possible to abort the foetus because it has in language already been eliminated

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[44] Niklas Luhmann argues that the "threshold cases of birth, giving birth, and death, . . . can neither be understood as legal acts nor do they owe their relevance to other acts. It could be said that they owe their legal relevance to a decision by the legislator" (17).

imaginatively. The foetus as the "thing" that is acted upon becomes an object that carries the weight of its "wrongful" existence in the material act of abortion. Moreover, it is possible to see that if the concept that envelops the foetus is its inhumanity, its otherness, then its elimination ceases to be a problem for humanity, and for those individuals included in this universalising concept of humanity.

This analysis implies that the basic element of institutional social systems such as law, is abstract "communication—not the human being" (Teubner 3): "communication as the unity of utterance, information and understanding constitutes social systems by recursively reproducing communication" (3). In other words, "what a particular culture thinks of as 'the human' is only ever the accepted construct of whichever genres of discourse happen to be the organizing principles for that social group" (Malpas 90). In this particularly Canadian liberal-democratic nexus, where the genres of discourse claim to tell the legal and scientific truth about what counts as a human "person," the abortion debate is indicative, on one level, of the ways in which the foetus, figured as a non-normative human being, is discounted and dehumanised. On another level, however, this analysis has implications for all non-normative "others" and their treatment in the courts of law and in the larger social system. Calling into question the ideal tenets of a liberal-democratic rule, this potentially violent system of legal communications has implications for the establishment of a philosophical and practical ethics that privileges certain lives over others, and makes the argument that some "inhuman" lives are not worth living.[45]

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[45] For example, there was a conspicuous absence of debate from either the pro-life or pro-choice factions concerning whether or not the disabled foetus should or should not be aborted. The general assumption was that preventing the birth of those who might be born with social, mental, physical, and medical defects—such as those born with severe disabilities, foetal alcohol syndrome, or even those born with mild abnormalities—would be a good idea, especially if the abnormalities could be seen to detract from the individual's potential to become a responsible, rational or rehabilitated citizen. Although the Canadian

While Chantal Mouffe perceives that the paradoxical conflict between liberal and democratic values calls into question the future of democracy in the western world, I specifically examine how these conflicting liberal and democratic values constitute a crisis-filled negotiation of acceptable and unacceptable subjectivities within the Canadian nation. While the abortion debate is illustrative of this rhetorical and practical crisis, showing how this negotiation of acceptable and unacceptable subjectivities plays a central role in the constitutional and legal foundations of the liberal-democratic Canadian socio-political order, it is not its exclusive location.

Abortion, passive and active euthanasia, and mercy killing are all practices that illustrate how "every actual democracy rests on the principle that not only are equals equal but unequals will not be treated equally. Democracy requires, therefore, first homogeneity and second—if the need arises—elimination or eradication of heterogeneity" (Schmitt qtd in Mouffe 38). It is the willing and unwilling, coerced and forced elimination of heterogeneous individuals that occurs under the ideal liberal-democratic values of liberty and equality that concerns me here. The tension between a universalising liberal conception of equality which "postulates that every person is, as a person, automatically equal to every other person" and a democratic conception of equality which distinguishes between those "who [belong] to the demos and [those] who [are] exterior to it" (Mouffe 39), is resolved politically first by the creation of homogenous individuals or citizens, who share the same "*substantive* equality" (38), and

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government does not require the abortion of disabled foetuses, medical, social, and economic pressures compel women to abort in these situations. Taking for granted that potentially "defective" foetuses will, necessarily, be aborted, omits to take into account a full discussion of the larger and more "slippery" consequences of what can be essentially called "foetal euthanasia" for all socially, physically, and mentally non-normative individuals.

second, by the identification, exclusion, and even elimination of those who embody "substantive inequalities," and may be considered non-persons or unequals (41).

Erasing or assigning these individuals a marginal space in the liberal-democratic imagination appears to resolve the post-modern predicament—a contemporaneous desire for certainty and a concomitant validation of difference to which Mouffe refers—by defining the boundaries of acceptable citizenship, upon which a concept of human rights is based. Paradoxically, this containment of difference undermines the pluralistic values that purport to be held by a liberal democracy, and points, as Todd May states, to the insidious establishment of a "totalitarian politics", intent not on validating difference, but on "constraining people's lives and identities within narrowly defined parameters" and conceptual categories (4).

In the next chapter, I consider these constraints in light of the way in which a capitalist, neoliberal political economy influences a liberal-democratic emphasis on pluralism and the establishment of human rights. More specifically, I argue that while the abortion debate raises questions about personhood and its relationship to human rights and citizenship, euthanasia raises more fundamental questions about what it means to be human in a post-modern, capitalist, and technologically advanced world. By reading the Sue Rodriguez case, I argue that the debate about euthanasia, although couched within a rhetoric of human rights and within an empathetic response to individual pain and suffering, constitutes a slide from a liberal-democratic politics with its hidden focus on the creation of acceptable and unacceptable subjectivities to a specific death-making ideology that is simply there like life itself, working in the shadows of a democratic

liberal and capitalist ideology to instigate a nationwide devaluation of certain forms of human life.

Assisted-Suicide and Euthanasia: The Sue Rodriguez Case and The Special Senate Debate

Sue Rodriguez was diagnosed with Amyotrophic Lateral Sclerosis, commonly known as ALS or Lou Gehrig's disease,[1] in 1991, when she was forty-one years old (Hobbs Birnie 3). Her diagnosing physician, Dr. Eisen, told Rodriguez "she would experience progressive muscle atrophy resulting from loss of spinal and cortical motor neurons over months to years. This would lead to complete paralysis and eventual death" (3). In 1992, "with all hope of a cure gone, . . . she decided to commit suicide," and, with the help of John Hofsess, the founder of the Right to Die Society of Canada, and Chris Considine, her defence lawyer, she initiated a legal claim in the B.C. courts, which requested that when her condition became unbearable, she would be entitled to obtain the help of a physician to commit suicide (36).[2]

In court, under the guidance of John Hofsess, and her lawyer, Chris Considine, Rodriguez positioned herself as a mentally competent person who had a right to end the prolonged suffering, pain, and lack of dignity that her disease and life-sustaining technology might bring her. Stating that she had a constitutional right to control the circumstances of her imminent death, Considine, on her behalf, argued in the B.C Supreme Court that section 14 (the section that does not allow consent to "affect the criminal responsibility" of the person inflicting death) and section 241 (b) of the Criminal

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[1] Lou Gehrig is the famous baseball player who also died of the disease.

[2] This request was preceded by an appeal in November 1992 to the Parliamentary Committee in Ottawa, who were engaged at that time in the task of "recodifying" the Criminal Code, including the sections on Euthanasia and Assisted Suicide. In this much publicized videotaped appeal, Rodriguez asked the committee to consider her request to receive the help of a physician to commit suicide, concluding her speech to them with the famous question, "I want to ask you, gentlemen, if I cannot give consent to my own death, then whose body is this? Who owns my life?" (qtd in Hobbs Birnie 50).

Code (the section that states that any person who "aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years") violated Sue Rodriguez' rights under sections 7, 12, and 15 of the *Charter of Rights and Freedoms*.

In this respect, he argued: a) that denying Rodriguez the legal right to assisted suicide infringed upon her right to exercise control over her body while still alive (an argument that challenged section 7 of the Charter, the section that pertains to the "right to life, liberty, and security of the person"); b) that forcing Rodriguez to undergo treatment amounted to cruel and unusual punishment (related to section 12: "everyone has the right not to be subjected to any cruel and unusual treatment or punishment"), and c) that disallowing Rodriguez the right to obtain help to commit suicide constituted discrimination under the law, effectively allowing an able person to commit suicide, while making it illegal for those who are physically handicapped to do the same (related to section 15, the "equal protection and equal benefit of the law without discrimination" clause).

Rodriguez' request was ultimately denied in the Supreme Court of British Columbia (December 30th, 1992), in the British Columbia Court of Appeal (1993), and in the final September 30,th 1993 decision by the Supreme Court of Canada.[3] This final Supreme Court Decision resulted in a five to four split, with Justice J. Sopinka writing

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[3] When Justice J. Melvin of the Supreme Court of British Columbia dismissed Rodriguez' appeal, he cited R. v. Morgentaler as a comparison to the Rodriguez case. He argued that although the "court struck down s. 251 of the Code as violating a woman's s. 7 right to security of the person on the basis that the effect of the law was to limit a woman's ability to obtain effective and timely 'medical treatment'," this decision could not be compared to the Rodriguez case because "to grant Ms. Rodriguez a remedy under the Charter, would . . . be tantamount to imposing a duty on physicians to assist patients who choose to terminate their own lives, which would be 'diametrically opposed to the underlying hypothesis upon which a Charter of Rights and Freedoms is based, namely, the sanctity of human life." For Melvin, this was tantamount to "asking the court to go beyond the judicial domain and into the realm of general public policy, which . . . courts should refrain from doing."

the majority decision for Justices La Forest, Gonthier, Iacobucci, and Major, and with Justice J. McLachlin (Justice L'Hereux-Dube concurring), Justice C.J.C. Lamer, and Justice J. Cory writing independent dissenting opinions. While the Supreme Court decision reveals that the minority position, through the dissenting liberal views of Justices McLachlin, Lamer, L'Heureux-Dube and Cory, supported Rodriguez in her fight to obtain legal assistance to commit suicide, arguing for the rights of the rational individual to make his or her own choices concerning these life-and-death issues, the majority opinion, articulated by Justice John Sopinka, sided with the Charter's democratic mandate to protect the rights of *all* individuals. Deciding the case on this narrowly divided vote of five to four, the Supreme Court affirmed that

> s. 241(b) of the Criminal Code did not violate the woman's right to life, liberty and security of the person under s. 7 of the Charter, because the absolute prohibition was not contrary to the principles of fundamental justice—Section 241 (b) did not constitute cruel and unusual punishment under s. 12 and assuming, without deciding, that her s. 15 equality rights were violated, s. 241 (b) was a reasonable limit prescribed by law under s. 1.
>
> (*Rodriguez v. British Columbia (SCC)*).

In February of 1994, in response to this final legal decision, Rodriguez, with the help of an unknown doctor, committed suicide. Neither the Supreme Court ruling nor her suicide ended the debate. The attempt in the Rodriguez case and in the 1994 *Special Senate Committee on Euthanasia and Assisted Suicide*[4] to establish a consensus that would define the limitations of the equal grounds of liberty for normatively or rationally-

[4] The *Special Senate Committee on Euthanasia and Assisted Suicide* was established in 1994, at least in part, as a response to the legal, social, and ethical issues raised by the Rodriguez case.

conceived individuals became an agonistic, if not antagonistic, battle, divided along conservative-democratic and liberal new-left lines, that is still in process today.

At stake in these debates is not only the rational individual's right to receive help to commit suicide, but also the Charter values of equality and liberty, and the debate about who has power—the individual or the state—to decide. In this respect, the state itself is divided between institutional claims for power: Parliament, the courts, the medical establishment, and corporations have individual and often contradictory investments in these life and death issues. The strategic attempt to define which institutions and which individuals have rights, not only reveals that the terms "all" and "everyone" in the Charter are up for grabs, but that inequality, and a resulting discrimination, is endemic to the liberal, and specifically neoliberal,[5] democratic regime and, paradoxically speaking, antithetical to Canada's attempt to define itself as a pluralistic, inclusive and tolerant country.

The 1993 Rodriguez v. B.C. Supreme Court Decision and the Political Need for Consensus

Arguments for and against the legalization of euthanasia and assisted suicide are grounded in a claim to justice that is directed by the rational, normative operations and

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[5] As many theorists have recognized, the ethos of liberalism, which demands a well-regulated and responsible citizenship, has been replaced in the twentieth century (post World War II) by a liberalism that is informed and directed by its allegiance to corporate capitalism. The tendency of political governments to "*actively* create the conditions within which entrepreneurial and competitive conduct is possible" has created a situation that paradoxically refuses "'the intrusion of the State' into the life of the individual," while demanding that the individual, defined as a rational, productive being, interpret his or her freedom in terms of his or her ability to use his or her personal autonomy, enterprise, and free choice to obtain the material conditions necessary to the establishment of the "good" life (Barry, Osborne, and Rose 10). Because a liberalism informed by corporate capitalism pivots on the establishment of the rational, productive, and, I would argue, able-bodied individual, the individual who cannot perform in this arena is devalued.

deliberations of the law, as it is specifically constructed in Canada, and as it is informed by public opinion and the medical establishment.[6] In the 1993 Rodriguez Supreme Court Decision, both the majority and minority decisions make certain assumptions about what it means to be human that are indicative of a fundamental change in Canadian values. This change is reflected in the move from a democratic, sanctity-of-life ethics to a liberal, and specifically neoliberal, quality-of life-ethics. In different ways, both of these perspectives constitute an authoritarian politics that establishes agreement through the promotion of a rational consensus, and, particularly, through the promotion of a consensus that establishes the rational, autonomous individual as the acceptable model of human subjectivity.

Ironically, then, having made this claim, it is important to note that in the 1993 Sue Rodriguez Supreme Court Decision, Justice John Sopinka's majority decision rests upon his belief that there is no public or "cultural consensus" on issues of assisted suicide and euthanasia. As Sopinka argues, because in this case there is no apparent evidence "that the autonomy interest of those wishing to kill themselves is paramount to the state

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[6] Euthanasia can be defined either as active or passive euthanasia. Active euthanasia is more problematic in terms of legal arguments because it constitutes the intentional termination of an individual, who because of his or her health or condition, is deemed to be "better off dead"; the individual being euthanased does not give his or her permission. Passive euthanasia, by contrast, usually is performed with the permission of the patient, and more generally involves the withholding of treatment, which might or might not bring about death. Passive euthanasia is typified by the 1992 Nancy B. decision. In this case, the Quebec courts granted Nancy B., "a competent woman suffering from Guillain-Barre syndrome, an incurable neurological disease which left her incapable of movement, permission to cease treatment with a respirator at a time of her choosing" (*Special Senate Debate Final Report).* Assisted suicide can be seen as a form of active euthanasia in that it involves more than the withholding of treatment. The patient or individual being killed does give permission, but actively seeks his or her death by employing an individual (usually a physician) who will help him or her to die. Sue Rodriguez' case is a good example of active euthanasia. Similarly, mercy killing could be seen as a form of active euthanasia, in that the person doing the mercy killing does not have the permission of the person being killed, but assumes that it is in the individual's "best interests." The Robert Latimer case involving the father who murdered his daughter is a good example of mercy killing. However, as the *Special Senate Debate* stresses, in practice these definitions are ambiguous: there is "simply no consensus on what terms to use or how to define them due to divergent views on the moral and ethical significance of the various forms of conduct."

interest in protecting the life of its citizens," state interest and questions of fundamental justice must, Sopinka stresses, focus on "protecting life," not on enabling a means to end it. Because there is no consensus, the justices are responsible for arriving at decisions that reflect a balance or a "just accommodation" between the interests of the appellant and the interests of society. Therefore, priority must be given to the state when there is no apparent "consensus by Parliament or by Canadians in general" (*Rodriguez v. B.C. (SCC)*).

Conversely, the minority decision in this case claimed that a public consensus supports euthanasia. This claim allowed the four Justices who supported the legalization of euthanasia to argue that the unrestricted liberty of rational individuals overrides traditional democratic beliefs and conservative doctrine about the sanctity of life. For example, Justice McLachlin's opinion was clearly concerned with quality-of-life issues that, for her, take precedence over those pertaining to the sanctity of life.

Ironically, what is really being debated here is not the presence or the absence of a consensus, but the form that this consensus should take in a modern liberal-democratic society. While Sopinka's conservative, democratic opinion favours a consensual privileging of the status quo, as that status quo is supported by a procedural or interpretivist reading of the law—a reading based on historical precedents and rooted in original readings of constitutional intentions—Justice McLachlin's opinion supports a more radical judicial activist or non-interpretivist reading of the law, as that law is contextualized in a reading of the present socio-cultural and political climate.

Critiquing the contemporary political attempt to find and justify a consensual middle ground, Chantal Mouffe points out that the belief that political decisions can be

reached consensually through a process of "deliberation among free and equal citizens" (81), is an illusion. To this end, she argues that although "popular opinion believes that it should be possible to overcome the conflict between individual rights and liberties and the claims for equality and popular participation" (8), in practice, these conflicts, which constitute the paradox at the centre of liberal-democratic thought, are never resolved.

Similar to the problems found in the political attempt to resolve the abortion debate, then, the two respective judicial opinions in the Rodriguez case, reflecting as they do an antagonistic democratic and liberal politics, are evidence of Mouffe's point concerning not only the impossibility of achieving a consensus, but also of the way in which a consensus is used as a political tool to support divergent political policies. From Sopinka's conservative perspective, Rodriguez' individual right to live her life with dignity, to control her body, to be free of governmental interference, and to make decisions about her own life is not in keeping with the democratic need to protect the vulnerable. For Sopinka, the public and the private are not separate, and there are potentially dangerous consequences in putting the rights of the individual above the rights of the community or state. In this situation, as Sopinka points out, the courts have to err on the side of caution, assuming that what constitutes a consensus in these situations is the historically and legally normative status quo.

However, for McLachlin, Lamer, and the other proponents of the liberal minority perspective, the rights of the individual should be given priority over the interests of the state. This belief, they argue, reflects the democratic will of the people and a new consensus, which considers that the rights of the individual rational person are central to evolving concepts of fairness and justice, established by legal precedents such as the

Morgentaler case, and by the increasing secularization of contemporary Canadian society.

Although the conservative sanctity-of-life perspective received the majority of the votes in this Supreme Court decision, the narrow 5-4 margin constitutes a polarization which indicates that, although both sides share the same symbolic liberal-democratic space, the us-them politics of the two opposing sides of the debate constitute an antagonism that cannot be eradicated. Representative of the essential incompatibility of democratic notions of equality for all citizens and a liberal allegiance to individual liberty—the two logics that are constitutive of a liberal democracy—these cases indicate a central problem in Canadian politics that cannot be easily resolved.[7]

As I emphasized in relation to the abortion debate, rather than seeing this antagonism as a problem, Chantal Mouffe views this antagonism as a potentially productive tool for addressing the "contingent historical articulation" of the liberal-democratic logic and the problems it poses for contemporary society (3).[8] Rather than attempting to eliminate the tension that exists between "perfect liberty and perfect equality" by creating a consensus (13), Mouffe proposes the development of a politics that recognizes the antagonistic and potential violence inherent in every relationship, but attempts to transform this antagonism into an agonistic—adversarial friends—politics.

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[7] Mouffe argues that in a "modern democracy, we are dealing with a new political form of society whose specificity comes from the articulation between two different traditions. On one side we have the liberal tradition constituted by the rule of law, the defence of human rights and the respect of individual liberty; on the other the democratic tradition whose main ideas are those of equality, identity between governing and governed and popular sovereignty" (2-3).

[8] For Mouffe, the attempt to realize a rational consensus is the central problem with contemporary consensus models of democracy, such as the deliberative democracy promoted by Jurgen Habermas and John Rawls and "Third Way" politics, promoted by Anthony Giddens, and established in practice by Tony Blair, and Bill Clinton. Because these models sustain the belief that antagonism can be eradicated—by attempting to reconcile democracy and liberalism, and by attempting, in a Third Way politics, to reconcile democracy and neoliberalism—they, in Chantal Mouffe's words, "[jeopardize] the future of democracy" (7), putting into effect, only a temporary stabilization of contingent "political forces which always establish the hegemony of one of them" (5).

This is in keeping with Mouffe's belief that "what is specific and valuable about a modern liberal democracy is that, when properly understood, it creates a space in which this confrontation is kept open, power relations are always being put into question and no victory can be final" (15). By refusing to domesticate the hostility and antagonism constitutive of human social relations, it is possible, as Mouffe proposes, not to overcome the "us/them opposition," but to "construct the 'them' in such a way that it is no longer perceived as an enemy to be destroyed but as an 'adversary', that is, somebody whose ideas we combat but whose right to defend those ideas we do not put into question" (101-2).

In keeping with Mouffe's analysis, it is possible to argue that the majority and minority positions in the Rodriguez case represent an agonistic liberal-democratic politics that, in the common symbolic space of the law, acknowledges the tension between conservative and liberal perspectives on issues of euthanasia. In Mouffe's terms, these respective agonistic positions call into question democratic notions of equality and liberty. By keeping conflict open, they draw attention to "the radical indeterminacy" of agonistic power (2), pinpoint the need for "the never-ending interrogation of the political by the ethical" (140), and, importantly, emphasize that the bond that joins us as a community is one that, paradoxically, constitutes us as "divided subjects" (139):[9] as subjects for whom "reconciliation is impossible" and for whom "antagonism and violence are ineradicable" (139).

Mouffe's notion of the divided subject—the subject who is unavoidably alienated

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[9] For Sigmund Freud, the subject can never be anything other than divided, split, alienated from himself. The split is irreducible, can never be healed; . . . the subject is split by the very fact he is a speaking being, since speaking divides the subject of the enunciation from the object of the statement. In a similar way, Jacques Lacan defines the subject "as an effect of language," theorizing the split or divided subject in terms of his or her unconscious ability to know the difference between truth and knowledge (Evans 192).

from himself and others, but who is paradoxically bound to the other through this alienation—has implications for an understanding of the majority and minority judgments in the Rodriguez decision. Although the divided subject speaks to the impossibility of finding unity or identity in a world characterized by dislocation, antagonism, distance, and lack, it also speaks to the socio-political and legal need for these subjects to be organized, contained, and reconciled in institutions, language, and practices that enable an identification with the concept of the subject as a knowing, conscious, rational, autonomous and able-bodied liberal being. Functioning as a place of identification, the divergent judgments in the Rodriguez case ultimately contain the debate, and the individual to which the debate refers, within a "rationalist universalist framework," according to a rubric that imagines the citizen according to his or her approximation to the imaginary "whole" subject and in relation to "Real" legal practices that "constitute specific forms of individuality and identity that make possible the allegiance" to this norm (68).[10] Speaking not to the "empty place of power," these legal opinions address a power, a liberal-democratic ethos, whose common agenda is masked by a morality and ethics that pertain to an agreement not in "opinions," but in *judgments* that, while affirming the norm, identify and negate non-rational, non-normal "forms of [human] life" (68).

In other words, although this debate appears to be based on an agonistic and often antagonistic disagreement concerning these life and death issues, and the associated individual versus state rights, at base is a consensual understanding of how life and individual personhood should be valued and constructed in a contemporary liberal

[10] I use the term "Real" here in a double sense to denote Lacan's notion of the term, as a "world of words that creates the world of things," bringing them into being, but also to denote a sense of scepticism around the implication that legal practices can constitute the subject (159).

democracy. While the majority, sanctity-of-life perspective values democratic equality and the authority of the state to protect individual equal interests, the quality-of-life perspective values liberty and the freedom of independent choice independent of state interference, the bond that unites both parties is their acknowledgment of the rational and able-bodied basis for any participatory imagination of the (neo)liberal-democratic "increasingly one-dimensional world" (7). Masking an awareness of this fundamental consensus is, paradoxically, an allegiance to antagonistic or even agonistic conflict.

I differ from Mouffe, then, in that I do not see agonistic conflict as being necessarily productive. I think, rather, that the conflict itself must be examined not in terms of its ability to keep open the debate, but in terms of its power to close the debate. The unwillingness to consider the way in which hidden consensual commonalities compromise an agonistic debate reveals, paradoxically, a consensus that has historically, socially, culturally, and politically always already structured the debate. In revealing these commonalities, these unspoken assumptions and original premises, it is possible to reveal the grounds of the debate, the common place of identification, and what is ultimately at stake. In the assisted suicide and euthanasia debate, the "blind spot of automatism," the blind adherence to the norm, is the assumption on both sides that rationality and able-bodied subjectivity are prerequisites for a "normal" and legally acceptable humanity (Lippmann 75).[11] The central paradox, in this respect, is that a "normal" and legally acceptable humanity exists not as a result of liberation—the liberation of an individual's rights—but as a result of humanity's alienation from and

[11] According to Walter Lippmann, it is these unconscious blind spots that, working hand-in-hand with the stereotype, enable individuals to structure their world as they "expect it to be" (69). While the stereotype provides an automatic "economizing effort and focusing [of] energy," the blind spot, "keeps away distracting images," covering up "some fact, which, if it were taken into account, would check the vital movement that the stereotype provokes" (75).

containment in a systemic and structured violence that purports to value difference, equality and liberty at the same time as it negates, in language and practice, the non-normative other.[12]

Analyzing the Sanctity-of-Life "Majority" Perspective

A (re)consideration of how the "original" premises and the original assumptions inherent in liberal-democratic theory and practice speak to some of the assumptions specific to the debate about euthanasia and assisted suicide, is useful to my analysis of the majority sanctity-of-life judgment in the Rodriguez v. B.C. 1993 Supreme Court decision. Not only do these liberal-democratic tenets expose the agonistic "disagreement concerning the way social justice should be implemented," but also these tenets expose the way in which social justice rests on naturalized, constructed, normative (even stereotypical), and often violent assumptions about what constitutes the good life, and what constitutes the form of human-being most suitable to the establishment and maintenance of this life. More specifically, the focus on rationality and objective rational thought, as typified in John Rawls' liberal-democratic theory, provides a basis for thinking about a liberal-democratic ethos, and its connection to a politics of marginalization, depoliticization, stigmatization, and oppression: a politics that in the name of liberty and equality violates those whose difference is considered to be a danger

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[12] William Connolly's agonistic call, in *Identity / Difference: Democratic Negotiations of Political Paradox,* to value diversity and difference provides an example of how even a left-wing liberal politics can paradoxically foreclose agonistic possibilities for radically different identities that exist outside of a normative rational framework. Compromised by his theoretical rethinking of the life and death issues embedded in euthanasia, his theory can be seen to rely on and value a specific form of humanity, and narrowly-defined perceptions of difference. In this way, it perpetuates an interpretive violence that, while appearing to liberate, dictates the responsibilities and attitudes of the normative majority that makes the discrimination and even elimination of non-normative individuals possible.

to the political legitimation—the rights and duties—of the collective Canadian normative identity, and the normative individual, in particular.[13]

The focus on rational and objective thought as a prerequisite and condition of political being and legal human personhood has its immediate antecedents in John Rawls' *Theory of Justice*. In this theory, Rawls outlines both a moral concept of the "original position" of equality and a moral concept of moral personhood. These concepts are set within a framework that presupposes that morality itself is the basis of the rational, liberal endeavour. As Rawls explains, liberalism "is a theory of moral sentiments . . . setting the principles governing our moral powers, or, more specifically, our sense of justice" (51). Within this theory, Rawls' "original position" is designed to focus moral sensibilities so that the individual can consider and judge more intuitively the moral relevance to individuals of the liberal ideals of justice and fairness (12).

Beginning with the initial premise of equal fairness, the original position has, as its logical starting point, a hypothetical situation characterised by the idea that "no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence and strength and the like" (12). In other words, Rawls' theory posits that if people are denied knowledge of their present and future beliefs, circumstances, and natural endowments, they will, in an attempt to pursue what is in their own rational self-interest, choose beliefs, and just

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[13] As Chantal Mouffe argues, "liberal democracy—in its various appellations: constitutional democracy, representative democracy, parliamentary democracy, modern democracy—is not the application of the democratic model to a wider context, as some would have it; understood as a *regime* it concerns the symbolic ordering of social relations and is much more than a mere 'form of government'. It is a specific form of organizing politically human coexistence which results from the articulation between two different traditions: on one side, political liberalism (rule of law, separation of powers and individual rights) and, on the other side, the democratic tradition of popular sovereignty" (18).

principles "to govern the assignment of rights and duties and to regulate the distribution of social and economic advantages" (61).

Although Rawls' theory of the original position and its corresponding "veil of ignorance" assumes that equal liberties and equal opportunities exist or can be regulated or governed between citizens, in reality this equality is balanced by a recognition that the liberties of equal citizenship are always constrained, in a normative sense, by duties, prohibitions, rules, and by a consideration of unequal social positions: class, gender, race, and disability. In other words, in a "well-ordered society," any attempt to overcome the antagonism inherent in "claims for individual rights and liberalism and claims for equality and popular participation" must first acknowledge that inequality is "inevitable in the basic structure of any society" (7).

As Rawls argues, because the social "structure contains various social positions," and because "men born into different positions have different expectations of life determined, in part, by the political system as well as by economic and social circumstances," there are, even in a "well-ordered society," "deep inequalities" that need to be addressed by the regulative "principles of social justice" (7). Consequently, according to Rawls, while a liberal-democratic regime must secure the basic liberties for all its citizens, it must recognize also that there are "uncertain grounds" for equal liberty (244). Within this scenario, there is ultimately the recognition that "the worth of liberty to persons and groups is proportional to their rational and/or physical capacity to advance their ends within the framework the system defines" (204).[14]

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[14] According to Rawls, this framework presupposes a "competitive scheme" (272) in which "equality of opportunity" is achieved ideally by insuring "equal chances of education and culture for persons similarly endowed and motivated" and by presupposing for similarly endowed individuals the existence of "equality of opportunity in economic activities and in the free choice of occupation" (275).

Although in the 1993 Supreme Court decision, Justice John Sopinka recognizes Rodriguez' claim to rationality, and the inequality of a system that while allowing able-bodied individuals the opportunity to commit suicide,[15] refuses the disabled the same rights, he does not let an awareness of this inequality influence his judgment. While acknowledging Rodriguez' reasons for wanting to commit suicide, and while sympathizing with her "fear that she will be required to live until the deterioration from the disease is such that she will die as a result of choking, suffocation or pneumonia caused by aspiration of food or secretions" (*Rodriguez v. B.C. (SCC)*), he still affirms that assisted suicide should be prohibited. Even though s.241 (b) of the Criminal Code would prevent Rodriguez from obtaining the "assistance to commit suicide when she [was] no longer able to do so on her own," he could not endorse its revision under sections 7, 12, and 15 of the Charter. For Sopinka, the uneven ground for equal liberty, security of the person, and equality represented by Rodriguez' inability to commit suicide herself, does not constitute cruel or unusual punishment for Rodriguez, and does not warrant a change in the law.

In respect to this decision, he argues that the "generally held and deeply-rooted belief in our society that human life is sacred and inviolable," which is fundamental to any discussion of rights outlined in the Charter, must remain paramount. Influencing the decisions of the Supreme Court are considerations of how the Supreme Court Justices, as representatives of the status quo, of a particularly Canadian "form of democratic government" embedded in the Charter values, address and are responsible to "the interests of the individual and those of the state." Because in this case there is no apparent evidence "that the autonomy interest of those wishing to kill themselves is paramount to

[15] Suicide was decriminalized in Canada in 1972.

the state interest in protecting the life of its citizens," state interest and questions of fundamental justice must, Sopinka stresses, focus on "protecting life" not on enabling a means to end it.

Sopinka's stated primary concern, then, is to clarify and balance both the individual and the state perspectives: what Rodriguez as a free and rational person should be able to do with her life—which includes making decisions about her death—and what, concomitantly, the courts and the state have a responsibility to do in relation to these life and death issues.[16] For Sopinka, the issue "can be characterised as being whether the blanket prohibition on assisted suicide is arbitrary or unfair in that it is unrelated to the state's interest in protecting the vulnerable, and that it lacks a foundation in the legal tradition and societal beliefs which are said to be represented by the prohibition." Reflecting Justice McIntyre's procedural judgement in the Morgentaler case, then, Sopinka argues for a traditional reading of Section 241 (b), which "has as its purpose the protection of the vulnerable who might be induced in moments of weakness to commit suicide. This purpose is grounded in the state interest in protecting life and reflects the policy of the state that human life should not be depreciated by allowing life to be taken."

In his consideration of these interests, Justice Sopinka decided that section 7 of the Charter was the "most substantial issue." The question as to "whether s. 241 (b) infringes s. 7," by "[inhibiting] the appellant in controlling the timing and manner of her death," and hence depriving her of both "her liberty and her security of the person,"

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[16] By arguing that the courts must "[balance] the interest of the state and the individual," Sopinka differed from Justice J. McLachlin's earlier opinion in the B.C. courts, which argued that "the State interest is an inappropriate consideration."

supersedes the questions raised by sections 12 and 15.[17] While an appeal in relation to section 12 was dismissed because "cruel and unusual punishment" or treatment is not actively inflicted by the state, the "appellant [being] simply subject to the edicts of the Criminal Code, as are all individuals in society," section 15 was dismissed because, although the prohibition does constitute an infringement of section 15 equality issue, the infringement itself was not justified under section 1 of the Charter. Section 1, which deals with the "reasonable limits prescribed by law,"[18] does not, in Sopinka's majority opinion, provide a reason to believe section 241 (b) infringes or denies Sue Rodriguez her rights guaranteed by sections 7, 12, and 15. According to Sopinka, section 241 (b) and the cultural consensus that prohibits an individual to assist another individual to commit suicide are proportionally connected in that they both attempt to establish reasonable limits concerning the way in which all individuals are protected "against the control of others in their lives."

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[17] With the exception of Lamer and Cory, both the majority and the dissenting opinions agreed with this analysis. According to Justice McLachlin, who wrote one of the dissenting opinions, Section 15 of the Charter, the section that pertains to equality rights, does not adequately address Rodriguez's discrimination in that it may "deflect the equality jurisprudence from the true focus of section 15", which is, according to McLachlin, "to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society." Justice Lamer, however, who found that section 241 (b) of the Criminal Code infringed section 15, argued that unintentional discrimination is created by section 241 (b) when it prevents persons with disabilities from choosing to end their own lives. Because the legal option of suicide is open to able-bodied persons, it should be made available to those who have physical disabilities and are unable to commit suicide unaided. Unlike Sopinka, he did not see why protecting vulnerable people should be an issue. Assuming that physically disabled people are vulnerable, he argued, is discriminatory in that it perpetuates harmful stereotypes of people with disabilities. In my opinion, both McLachlin's and Lamer's readings of section 15 have specific relevance for an analysis of adverse impact or unintentional discrimination. Both of these readings speak to the way in which the constitutional guarantee of equality for all people is problematic in that it inevitably discriminates against some people. McLachlin's denial of Rodriguez' disability and Lamer's denial of the vulnerability of people with disabilities speaks implicitly of the prejudice that they attempt in their interpretations to avoid.

[18] Section 1 of The *Canadian Charter of Rights and Freedoms* "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (*Charter*).

Acknowledging Rodriguez' insistence that her appeal is about her right to life rather than her right to die, and on her right, while living, to control her own life and body, Sopinka's focus on section 7 can be read as a specific response to Rodriguez' assertion that

> Prohibiting anyone from assisting her to end her life when her illness has rendered her incapable of terminating her life without such assistance, by threat of criminal sanction, s. 241 (b) deprives her of both her liberty and security of the person. The appellant asserts that her application is based upon a) the right to live her remaining life with the inherent dignity of a human person, b) the right to control what happens to her body while she is living, and c) the right to be free from governmental interference in making fundamental personal decisions concerning the terminal stages of her life. (*Rodriguez v. B.C. (SCC)*)

However, although Sopinka acknowledges Rodriguez' right to control her life by controlling "the time and the manner of her death," he points out that "a consideration of these interests cannot be divorced from the sanctity-of-life, which is one of the three Charter values protected by s. 7." Because "none of these values [life, liberty, and security] prevail a priori over the others," because "security of the person is intrinsically concerned with the well-being of the living person," Rodriguez' specific claim to liberty and security does not, according to Sopinka, negate the fundamental value embedded in the Charter that recognizes and prioritises the right to maintain, value, and nurture life.

In other words, although as a rational individual, Rodriguez has a claim to liberty and security, her claim, in Sopinka's eyes, does not supersede the claim of other individuals who might be adversely affected by the legalization of assisted suicide.

Sopinka's recognition, however, that there is a large population of non-rational or non-normative people who need protection does not prohibit him, in a similar way to Rawls, from privileging the rational subject, who has the "capacity to form, to revise, and rationally to pursue a concept of the good, not merely for him or herself, but for others (Rawls 525).

For Rawls, this concept of the good structures the "just" liberal society and the "just" liberal individual. Contained within a normative framework, these representative persons are moral to the extent that they can use this reason to "understand, to apply and to act from (and not merely in accordance with) the principles of justice," as it is normatively conceived by the state to promote the good of "all" (525). Because these "normal" powers are "within the capacity of every *normal* person to develop and exercise," and because they are built on liberalism's "solid, normative foundation[s]," there is a general unspoken agreement that, in a circular fashion, moral excellence substantially advances the aggregate good of all *normal* individuals: those who are primarily male, healthy, able-bodied and rational (525).

Rawls, however, does recognize that his teleological theory does not equally apply to *all* individuals. Those whose experiences derive from either the "natural limitations and accidents of human life" or from the qualitatively different liberty that is created by "historical and social contingencies" (244), are suspect to a basic inequality that is "presumably inevitable in the basic structure of any society" (7). In his attempt to illustrate this qualitatively different inequality, Rawls argues that it is possible to imagine that the restricted "natural" liberty of a child or a "seriously injured or mentally disturbed" individual is different from the restricted historical or social liberty of a slave

or a prisoner of war. These latter limitations to justice, equality, and liberty create for Rawls a "very different problem from how best to cope with the inevitable limitations" of human life (245).

What Rawls is essentially pointing to here is the way in which justice rests upon a two-tier conception of morality that positions the qualitatively superior rational individual in a hierarchical relationship to the non-rational individual. It is because Sue Rodriguez is presented as an individual who, in Rawls' terms, is restricted by the "historical and social contingencies" of her disabling disease, and not by a lack of rationality, that she has recourse to a justice system that acknowledges "the primacy of equality and value" that is her due as a dignified, rational person (245).

This two-tier model of morality and justice, while providing recourse to a justice system and a liberal neutrality to those, like Rodriguez, whose inequalities do not stem from limitations to rational capacity, does, however, suggest an alternative way of accommodating and regulating those individuals who are not "perfectly reasoned" (Rawls 249). For Rawls, the answer lies in the implementation of a state-endorsed, institutional and individually constructed paternalism. Once institutionalised and internalised this paternalism offers those who are unable to rationally advance their own interests and/or manage their own affairs, a necessary "lesser freedom," and a necessary protection and management of their "irrational inclinations" (248). It is this "irrational" behaviour, an essential "failure or absence of reason and will," that authorizes others "to act on their behalf and to override their present wishes if necessary" (248).

While this paternal action is justified morally on one level because it protects "unreasonable" individuals "against their own . . . foolish actions . . . and imprudent

behaviour" (248-9), on another level, paternalism, as an ideology and as a practice, functions politically to provide a consensus on social justice that works primarily to establish, maintain, protect, and monitor the power, health and well-being of those "who have realized their moral powers to a degree sufficient to be free and equal [citizens]" (24). For these moral, reasoned individuals, paternalistic intervention and principles protect them from those who threaten the just and rational social order.

This is where Sopinka's perspective becomes problematic. While Sopinka's democratic desire to protect the vulnerable recognizes the potential inequality of a system that attempts to protect "all individuals against the control of others over their lives," his assumption that hegemonic institutions, such as "medical organizations and our own law reform commission," have the authority to decide for all disabled individuals what is best for them, creates an inequality that works at the individual and institutional level to contain the individuals it attempts to protect. In cases where individuals are "unable to make decisions for their own good," there is a growing general consensus that all reasonable institutions and all reasonable institutional agents have a responsibility, a "natural duty," to identify, assess the extent of the deviance, and make the "necessary" decisions for these non-rational, deviant individuals. This unequal power relationship creates an oppressive regime, which controls through the instrumentalization, pacification, objectification and delegitimation of non-normative subjects (249).

Paradoxically, while paternalism promises freedom and protection from irrational inclinations, it does so by demanding, as Rawls argues, that all individuals "[consent] to a scheme of penalties"—enforced by law, if need be—that authorize a loss of freedom, power, and privilege for those who challenge or in any way exceed the rationally-defined

norm (249). The consensus that irrational individuals should be penalized "for their own good" and for the good of a rationally constituted liberal-democracy assumes first, that all rational and irrational individuals want and value the same version of the good, and second, that there is no tension between the "perfect liberty and the perfect equality" imagined by a liberal-democratic ideology (Mouffe 10).

In other words, in establishing paternalism as a consensual practice and philosophy to which all individuals agree, the democratic solution proposed by Sopinka leaves no space for an "adversarial agonistic contestation of shared values" (122). Instead, it makes effective a consensus that, paradoxically, in the name of equality, discards these ideals, denying rights by refusing some individuals their democratic right to choose, while establishing for some individuals the right to make decisions for others, once those others are deemed irrational or, in some way, incapable. While these coercive tactics speak to the attempt to constrain Rodriguez within a medical and legal system that restricts her independence and individuality by assuming to know what course of action—or non-action—is in her own best interest, and to the rights of women to control their own bodies, as in the abortion debate, it also has potentially negative consequences for people of colour, children, poor, aged people or people with disabilities.

In short, this state-approved paternalism can be problematic because it accords authority to hegemonic institutions, communities, and individuals who might abuse their authority.[19] In the Rodriguez case, Sopinka's paternalism not only attempts to authorize

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[19] This analysis has particular relevance to the Latimer case (discussed in Chapter three). In the Latimer case this state-approved paternalism becomes particularly problematic when it supports certain individuals—Tracy Latimer's father, for example—in their choice to kill their disabled children. Taken together these two cases indicate the presence of a slippery slope that slides, problematically, from endorsing the choice to live to endorsing the choice to kill.

institutions and institutional agents to define who is deemed to be rational, and who is deemed to be irrational and, therefore, in need of guidance, but also suggests to Parliament the future role it may play in the issue. Because Sopinka's deferral to Parliament constitutes a recognition not only that Parliament should address the issue, but also that the minority perspective might, indeed, have some validity, there is, in his argument, an ambiguousness, which Sopinka himself acknowledges might lead to a

> charge of hypocrisy; because it can be asked why, if the doctor, by discontinuing treatment, is entitled in consequence to let his patient die, it should not be lawful to put him out of his misery straight away, in a more humane manner, by a lethal injection, rather than let him linger on in pain until he dies. But the law does not feel able to authorize euthanasia, even in circumstances such as these; for once euthanasia is recognized as lawful in these circumstances, it is difficult to see any logical basis for excluding it in others. (*Rodriguez v. B.C (SCC)*)

In this way Sopinka can be seen to be concerned not so much with implementing the Charter's original intent, which was to defend "the sanctity of human life," but with remaining firmly within the "judicial domain." In Sopinka's words, although there might be some validity to the minority argument, "courts should refrain" from going "beyond the judicial domain and into the realm of public policy." Rather than speaking to an hypocrisy, then, the diverging majority and minority perspectives speak to differing perspectives and beliefs concerning the role that law should play in deciding the leading issues of the day.

Analyzing the Quality-of-Life "Minority" Perspective

While the majority opinion in the 1993 Supreme Court decision is based as much upon a refusal to overstep the traditional boundaries of legal authority, the minority position is based upon a belief that the law has a responsibility to address pertinent social issues, such as the issue of assisted-suicide and euthanasia. Setting up this judicial activist or non-interpretivist perspective first in the B.C. court of appeal, Justice C. J. McEachern (dissenting), who is cited extensively in the 1993 Supreme Court decision, stressed that, notwithstanding the "importance of the policy dimension of this case, there is an urgent need to recognize the appellant's "unique circumstances." To "await further direction from Parliament" is to "abnegate responsibility for interpreting the law." Agreeing with this interpretation, Justice C.J.C Lamer, in the Supreme Court decision, argued that Rodriguez should be granted a constitutional exemption, following the conditions set down by McEachern in his previous judgement, but, given the urgency of Rodriguez' request, allowing her to "dispense with the three day notice required to be given to the Regional Coroner and replace it with a 24 hour notice requirement."[20] From this judicial

[20] McEachern's conditions included: "First, the appellant must be mentally competent to make a decision to end her own life, such competence to be certified in writing by a treating physician and by an independent psychiatrist who has examined her not more than 24 hours before arrangements are put in place which will permit the appellant to actually terminate her life and such arrangements must only be operative while one of such physicians is actually present with the appellant. . . . Secondly, in addition to being mentally competent, the physicians must certify that, in their opinion, (1) the appellant is terminally ill and near death, and that there is no hope of her recovering; (2) that she is, or but for medication would be, suffering unbearable physical pain or severe psychological stress; (3) that they have informed her, and that she understands, that she has a continuing right to change her mind about terminating her life; . . . Thirdly, not less than three clear days before any psychiatrist examines the appellant for the purposes of preparing a certificate for the purposes aforesaid, notice must be given to the Regional Coroner . . . Fourthly, one of the physicians giving any certificate as aforesaid, must re-examine the appellant each day after the above-mentioned arrangements are put in place to ensure that she does not evidence any change in her intention to end her life. . . Fifthly, no one may assist the appellant to attempt to commit suicide or to commit suicide after the expiration of 31 days from the date of the first mentioned certificate, . . . Lastly, the act actually causing the death of the appellant must be the unassisted act of the appellant herself, and not of anyone else" (McEachern qtd in *R. v. Rodriguez B.C. (SCC)*).

activist standpoint, then, the traditional separation of Parliament—which has historically and legally dealt with issues of policy—and the law is not as important as the court's need to address Rodriguez' urgent attempt to maintain her right to "human dignity and individual control," and not as important as establishing the legal "guidelines for future petitioners in a similar position" (Lamer *R. v. Rodriguez B.C. (SCC)*).[21]

In the earlier B.C Court of Appeal dissenting minority decision, Justice McEachern argued that the "only route open to Ms. Rodriguez was under [s. 7 of] the Charter." In his opinion, section 7, and "its relation to questions of human dignity," was most suited to the Charter's "value system" and its obligation to protect the rights of a "terminally ill person facing what the appellant faces" (*R. v. Rodriguez. B.C Court of Appeal).* In the same respect, he discounted s. 12 (the "cruel and unusual punishment" clause) and s.15 (the "equality" clause) by making the argument that these sections did not apply to Rodriguez, and her assurance under the Charter that her "dignity and individual control" would be maintained.

In reference to section 15, in particular, he responded to Rodriguez' claim that "making physician-assisted suicide unlawful discriminates against physically disabled people," by avoiding Justice Melvin's point, in the B.C. Supreme Court, that the Charter is designed to "protect not discriminate," and by taking issue with the need to defend physically disabled people. For McEachern, the issue was not Rodriguez' physical disability, and whether or not the Charter should defend physically disabled people; rather, the issue, as McEachern saw it, had everything to do with Rodriguez' cognitive

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[21] In this respect, McEachern first suggested that a "remedy" be fashioned that would be "directly tailored to the appellant, but structured so as to offer a guideline to future claimants in analogous circumstances" (*R. v. Rodrigue. B.C. Court of Appeal).*

ability. In his terms, the "Charter is not concerned only with the *fact* of life, but also with the quality and dignity of life," as that life is defined by the individual's mental competence and ability to make decisions according to her own free will (my italics). In other words, according to McEachern, it is those who can be identified as rational mentally-competent human beings, able to make meaningful and dignified choices about their lives and, concomitantly, about their deaths that are entitled to rights under the law. Because, as McEachern argues, "death and the way we die is a part of life itself," those who live dignified lives are logically entitled to dignified deaths, whereas, by implication, those who live undignified lives, lives identified only with a physical, as opposed to rational, existence, are of no concern. Calling into question the very question of what constitutes the "human," and, by extension, the basic tenets of the Charter and its mandate to protect *all* individuals, McEachern makes visible a politics, which acknowledges that because some individuals have only a tenuous hold on the "fact" of life, rights and laws do not apply equally to them.

McEachern's opinion here illustrates the standpoint that while there is no doubt that "human life is fundamentally important to our democratic society," (Cory qtd in *Rodriguez v. B.C (SCC)*), the form that this human life "should" take, and the desire to preserve human life and the dignity of those living, is essentially connected to the idea that a qualitatively superior life is the well-considered or rational life. From this perspective, as Rodriguez believed, "the quality of life is the essence of life, and . . . a life deprived of quality [is] not worth living" (Hobbs Birnie 37). Consequently, MacEachern's observation that there is a "fairly recent, enlightened, medical-jurisprudential trend towards greater humanity and sensitivity towards the awful

problems of terminally ill citizens" must be read in relation to the tendency, on the other side of the proverbial coin, to negate the lives of those who cannot be classed as citizens, in the rational, participatory sense of the word (*R. v. Rodriguez. B.C Court of Appeal).*

In the Supreme Court decision, the minority opinions, while supporting MacEachern's devaluation of non-rational individuals, differed in respect to which Charter clause should be used to defend Rodriguez' position. Similar to Justice McEachern, Justice McLachlin argued that section 7—the liberty and security of person clause of the Charter—was most relevant to the case.[22] According to McLachlin, to deny Rodriguez the rational choice to obtain help to commit suicide is not only discriminatory, since this option is available to other rational individuals, but it denies her the right to "her security of the person," which McLachlin interprets as meaning, as per the Morgentaler case, "the right to make decisions concerning her own body, which affect only her own body." Justice McLachlin discounted Section 15 of the Charter, the section that pertains to equality rights, because, in her opinion, it "deflect[s] the equality jurisprudence from the true focus of section 15,"which is, according to McLachlin, "to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society."

The dissenting opinion of Justice Lamer, however, disagreed with McLachlin on this point. Arguing that section 15 is relevant to Rodriguez' claim, he suggested that unintentional discrimination is created by section 241 (b) when it prevents persons with disabilities from choosing to end their own lives. Because the legal option of suicide is

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[22] In this respect, McLachlin agrees with Justice Sopinka. However, while acknowledging the relevance of section 7 to the case, she "part[s] company" with Sopinka, when he claims that the infringement of Rodriguez' rights under this section "is necessary to prevent deaths which may not truly be consented to." Instead, she argues that to deny Rodriguez a choice that is made available to others, who are capable of committing suicide themselves, "cannot be justified."

open to able-bodied persons, it should be made available to those who have physical disabilities and are unable to commit suicide unaided. Claiming that the state's refusal to allow Rodriguez to obtain help to commit suicide "constitute[d] a disadvantage or burden" to her that seriously compromised her equality rights under section 15, Lamer argued that although "persons who cannot commit suicide and those who can are given identical treatment under s. 241 (b) of the Criminal Code," they "are nevertheless treated unequally since by the *effect* of that provision persons unable to commit suicide without assistance are deprived of any ability to commit suicide in a way which is not unlawful."

Ironically, given his argument that section 15 is discriminatory to Rodriguez, Lamer argues that protecting the equality rights of vulnerable people should not be an issue. Disagreeing with Sopinka, he argues that to assume that physically disabled people are vulnerable is discriminatory in that it perpetuates harmful stereotypes of people with disabilities. However, in establishing the argument that s.241 (b) of the Criminal Code discriminates against physically disabled people who are not able to commit suicide unassisted, he assumes first, that physically disabled people are able to make the same choices as the able-bodied, but that they are unable to act on these choices, and second, that physically disabled people are rational in that they should be able to make these choices about their own individual lives. In this way, Lamer is guilty of perpetuating a stereotype that assumes that all citizens who have rights—whether they are physically disabled or able bodied—are also rational. This logical fallacy speaks not only to an error in thinking that generalizes the experiences of the normative majority to the non-normative minority, but also to the way in which the law, through its system of rules and through its adherence to the norm, makes the authoritative claim that it knows rationally

what is good for the other. In making this claim, the law inadvertently and blindly commits an interpretive violence that has potential consequences for the establishment of, as Robert Cover argues, "organized, social practices of violence" (203).

Interestingly, whereas the Morgentaler case is concerned with women's rights, the Rodriguez case is positioned in terms of the universal rights of human personhood and in terms of the rights of people with disabilities. From a disability rights' perspective this culturally and historically contextualized positioning is interesting because it indicates a shift in rights' consciousness. Instead of positioning this debate in terms of women's right to own their own bodies, as Morgentaler did in the abortion issue, it is strategically positioned in relation to acknowledgement of the rights of people with disabilities. However, an awareness of disability rights does not discount, as the Rodriguez trial does, the rights of Sue Rodriguez, as a woman. As Susan M. Wolf argues in her article "Gender, Feminism, and Death: Physician-Assisted Suicide and Euthanasia," although the debate over physician-assisted suicide and active euthanasia is "most often about a patient who does not exist—a patient with no gender, race, or insurance status . . . a generic patient," it is important not to discount the role that gender difference plays in the assisted-suicide debate, and the way it might alter the equation (395).

Taking the position that a feminist analysis is essential to this debate, Wolf argues that because assisted suicide and euthanasia revolve around issues pertinent to feminism—"the rights of self-determination and autonomy; the reconciliation of those rights with physicians' duties of beneficence and caring; and how to place all of this in a context including the strengths and failures of families, professionals, and communities, as well as real differentials of power and resources"—feminism has a duty to "determine

whether tacit assumptions about gender are influencing the enthusiasm for legalization" (396). For example, there are, according to Wolf, "well-recognized gender differences in suicide statistics" that suggest not only that women request physician-assisted suicide more often, but that they more often request it to avoid oppressive, painful or depressive situations (396), to avoid being a burden (400), and to comply with the doctor's negative affirmations of them (396). Moreover, because, for women, self-sacrifice is historically and culturally associated with goodness, figured as a feminine virtue, women are more likely to see it as a solution.[23]

Hobbs Birnie's study of Rodriguez life reflects some of these concerns. Rodriguez was certainly influenced by the thought of the incapacity that would, at the end, render her life "obscene" (53), but she was also influenced by John Hofsess from the Right to Die Society and by politicians, such as Svend Robinson who supported if not encouraged her to make the choices she did. Playing a large part in this decision as well was her difficult relationship with her husband and her family who abandoned her at the end. As Hobbs Birnie writes, given that Rodriguez was not surrounded by a family who showed her their love and support, and given that she felt like a burden to her husband and to her caregivers, it may come as no surprise that "she did not fear pain: drugs could take care of that. She feared a drugged-out twilight of total dependency and hopelessness. . . . She dreaded above all else loss of control over her life" (37). Ironically, she was motivated by her belief that "taking her own life [was] acceptable to society," and until the end, she remained "innocently unaware of [the] entertainment value" that her determination to "shape her own death" created (170).

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[23] Wolf cites Greek tragedy here, arguing that suicide is specifically "a wife's solution; it is one of the few acts of autonomy open to her" (399). She also cites Victorian notions of "true" and "fallen" womanhood, and Carol Gilligan (*In a Different Voice*), who states that "virtue for women lies in self-sacrifice" (399).

Although Rodriguez' fight for assisted suicide speaks to larger issues of choice and consent, as well as the feminist issue of caring and woman's vulnerability in this unequal relationship, it also speaks to the unacknowledged and hidden violence of these practices, whether this violence is coercively represented as being "for her own good" or not. Because this relationship is constructed in a relationship of power, and because, as the Morgentaler, Rodriguez, and Latimer cases show, it is often by or under the influence of men that dis-abled or deviant women or their children—particularly girl children, as in the Latimer case—"meet their death," then an examination of the relationship between gender, vulnerability and violence is essential.

Generating "Truth": The Economy of Interpretive Violence

In that the majority and minority positions in the Rodriguez case privilege the rational subject and negate the life and the experience of the non-normative subject—the majority by means of promoting and supporting a state-endorsed paternalism, and the minority by negating the lives of individuals who do not have the rational capacity to choose or to "control his or her own body," at base a "type of autonomy most critical to an individual's feelings of self-worth and dignity" (Lamer *R. v. Rodriguez B.C (SCC)*)—they endorse a form of legal violence. According to the critical legal scholars, Austin Sarat and Thomas R. Kearns, because the "law's interpretive violence is presented as impersonal and even-handed rule following," it "encourages the false idea that the connections between text and the world (between reading and acting) are neutral, natural, and necessary when, in fact, these are contingent practices" based on the struggle for power concerning who decides the fate of certain individuals (210-211). While the

minority interpretation clearly opens the door to the negation, if not the violation, of certain individuals—those deemed to have a "lack" of rational quality—the majority interpretation, to a lesser extent, also violates non-normative individuals through its intent to regulate, if not incarcerate, them.

From the minority perspective, McLachlin's denial of Rodriguez' disability and Lamer's denial of the vulnerability of people with disabilities speak implicitly of a violating prejudice that Lamer and McLachlin attempt in their interpretations to avoid. Not only do these interpretations suggest a legal privileging of qualitatively superior citizens, in that they stress Rodriguez' mental acuity and strong will, but they also imply a legal negation, either indirectly or unintentionally, of "already disadvantaged classes of persons" (*R v. Rodriguez B.C. (SCC)*).

Through a similar irony, while Sopinka posits that ignoring the position of vulnerable individuals validates their violation, opening the floodgates to abuse, his promotion of paternalistic policies and practices suggests the potential violation of the rights and freedoms of non-normative individuals. In this respect, while Sopinka's question, "what of the person who takes advantage of another's depressed state to encourage him to commit suicide for his own financial benefit?" is pertinent, his comment that it might be hard to know the "true motivation of the person committing the act" must be read as an ironic comment on his own argument. The "reason to fear that homicide of the terminally ill for ignoble motives may readily be disguised as aiding suicide" must conclude not only that "anything less than complete prohibition" of assisted suicide is wrong, but also that the complete prohibition of assisted suicide must not be replaced by the complete prohibition of the rights of non-normative individuals,

even if those rights are contained within a paternalistic rhetoric, and within a social organization that speaks, not so much to care, but to an "economy of violence" (Sarat and Kearns 223).[24]

In other words, inasmuch as an ethics of care, "as the foundation of moral and social value," must make some individuals "vulnerable so that others can be worthy of their trust," it also, to the same extent, empowers a "corrective justice where existing relationships are themselves a source of repression" and oppression (Silvers 40). As Anita Silvers argues, in that this power dynamic marginalizes the individuals who are being "cared for," it establishes an oppressive paternalism that politically correct euphemisms such as equality and liberty cannot erase.

This violence is embedded, first, in the slipperiness of legal language and rhetoric, and the way in which, despite the court's attempt to define terms such as "treatment," meaning is always already contained within a normative framework.[25] For example, although Sopinka's use of the term "vulnerable" is designed to protect those individuals who might be taken advantage of by the legalization of euthanasia and assisted suicide, his tendency to omit the noun that the adjective describes (as in vulnerable persons), inadvertently allows the adjective to stand nominally for the collective group of people with disabilities (the vulnerable).

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[24] Sopinka's majority decision might also be read in terms of its attempt to affirm the judicial domain: an attempt to affirm and make secure the necessity of law, to prove that "no one, no matter how exalted his public office, or how righteous his private motive, can be a judge in his own case. This is what courts are for. . . . If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny" (Justice Frankfurter qtd in Sarat and Kearns 224).

[25] In keeping with his desire to accurately interpret the intent of the language in the Charter, Sopinka did take issue with the scope of the word "treatment" in relation to Rodriguez section 12 claim, demanding its contextualization in "some more active state process in operation, involving an exercise of state control over the individual." Ultimately, Rodriguez' section 12 claim, which argued that the state subjected her to a "cruel and unusual treatment or punishment" by preventing her the legal means to procure the help of an assistant to commit suicide, was dismissed by the majority decision because even if " a particular prohibition impacts upon [Rodriguez] in a manner which causes her suffering [it] does not subject her to 'treatment' at the hands of the state."

In this way, these individuals become known not through the specifics of their humanity, as persons who might have different views on pain, suffering, and the meaning of the word "quality," but through a reified identification with the normative meaning attached to the word "vulnerable". In this way, non-normative individuals become the "wound," those who "may be wounded" and those who may be "susceptible of injury" or "liable to higher penalties" (*Oxford Dictionary* 1461).[26] This nominalization works to provide a way of thinking about people with disabilities as non-persons, as a metaphor for the wound, the pain, and/or the suffering that they may or may not be experiencing. The use of the word urges not only a sympathy for those who might be deemed "vulnerable" and suspect to higher injuries or penalties within the system, but also, because the term itself already annihilates their subjectivity, predicts and even justifies the slide to using the term as a reason for their discrimination and, even, their elimination.

In this respect, as Lynn Smith points out in her article, "Rodriguez and Equality Rights," the "constitutional guarantee of equality rights" is not neutral. Sopinka's vague use of language, McLachlin's and L'Heureux-Dube's refusal to engage in a straightforward discussion of what they perceive to be an arbitrary inequality between able-bodied persons and physically-disabled persons (63), and Justice's Lamer and Cory's assumption "that the Criminal Code will protect vulnerable people without an absolute bar against suicide" (62), implies that equality, and the judicial language of equality, is becoming increasingly slippery, "elitist . . . obscure . . . incomprehensible," and "inaccessible" (49).

No longer a matter of assured protection, equality is reconstructed within "the

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[26] The *Oxford Dictionary* states that the adjective, "vulnerable" carries within its meaning, the Latin root word *vulnerare,* meaning wound (1461).

closed operational network of legal communications" as being indicative of a normative, predictable, ablist (able bodied and able minded) model of reality (Teubner 749). Because this construction dictates the construction of the legal person and the internal life of the normative community, it raises questions concerning what justice looks like in contemporary Canadian culture. In short, it raises the question as to whether legal justice is a tool of the "democratic will of the people" or whether the law is a mask for imposing discourses and practices on people that generate a specific truth, which serves to authorize the power of institutions and their normative knowledge that hold together the collective values and the social bonds of its good subjects or citizens.

From Gunther Teubner's perspective, the law, as an authority and as the ultimate adjudicator of human rights and duties, embodies a modern, reason-based concept of power that dictates everyday practices and discourses. These practices and discourses structure subjects according to the normative cultural classifications and stigmatizations promoted and enforced by the law. In order to enforce this norm, the law utilizes other institutional systems to apply and validate the "duty imposing rules" of the law ("Introduction to Autopoietic law" 6). In Teubner's terms, then, it is not individuals or individual institutions, but the law that utilizes other social systems, legitimating and making consensual the appropriate social conditions of legal change that make possible, in a circular sense, the legal norms that the courts prescribe (6).

Put another way, the law maintains its authority by "arbitrat[ing] between different reality constructions," and by incorporating social knowledge of scientific or common sense issues into legal models of social reality" (28). In this way, the law maintains its authority, mediating, formulating and managing ideological and institutional

structures by providing them with "congruent," legally-authoritative "generalizations for the whole society" (Luhmann qtd in King and Piper18).

Structuring the relationship between individuals and institutions, the normative operations of the law generate a consensual truth and knowledge about individuals, taking into account not what is good for *all* citizens, but what is good for *all* citizens when the competing rights of citizens (the child versus the parent, for example), and competing ideologies (justice and welfare, for example, that have institutional affiliations with the law and social work) are given consideration. Legitimating, then, not a constitutional equality for *all* citizens, but a "reductionist, dualistic ordering of experience," the law constructs a normative consensual knowledge or truth, which identifies the type of people valued by the law, the responsibilities accorded to them, and their relevant rights (King and Piper 10).

Within this apparatus, the law addresses the needs of those who, because of their age, gender, sexual orientation, illness or disability, are unable to conform to the norm by putting in place the societal structures that determine what is in the best interests of these non-normative people (31). This becomes problematic when a specific ruling or law is taken to apply to all individuals. For example, in the Rodriguez case, the assumption in the minority judgment that it might be in Rodriguez' best interests that she commit suicide becomes problematic when taken as a precedent for all end-of-life situations. In this way, as Michael King and Christine Piper argue in *How the Law Thinks About Children,* the law can be seen to perpetuate an ideology that is concerned not so much with equality as with inequality, not so much with justice, but, rather, with the "consolidation of social injustice" (11): in this case, the social injustice perpetuated

against those who do not conform to the normal able-bodied and rational model of personhood.[27]

While Teubner makes a good argument that points specifically to the law's attempt to establish a rational consensus that mediates, formulates, and manages ideological and institutional structures, he does not take into account how the law works hand-in-hand with institutional claims to power or with state enforced administrative structures and regulatory schemes of a particular neoliberal version of democracy to provide a negative and potentially dangerous rhetoric about people who are deemed to have a lack of quality in their lives. This rhetoric supports specific institutions that, in turn, support a neoliberal ethics and zeitgeist that advocates the legalization of euthanasia and assisted suicide by drawing a constitutional line between individuals of varying competences, and by refiguring an individual's right to equality and liberty through the lens of a democracy increasingly defined by its relationship to corporations and through its relationship to a systemic violence embedded in institutions. This violent corporate-focused rhetoric became particularly visible in the 1994 Special Senate debate on Euthanasia and Assisted Suicide that was largely inspired by the Rodriguez case.

Drawing the Constitutional Line: The Special Senate Debate on Euthanasia and Assisted Suicide

Although Sue Rodriguez' request for physician-assisted suicide was denied in the September 30th, 1993 Supreme Court of Canada decision, the narrow five to four margin

[27] Here, we might also add "male" to the list of signifiers.

made a parliamentary debate inevitable.[28] Consequently, on January 17th, 1994 a *Senate Special Committee debate on Euthanasia and Assisted Suicide* was instituted in an attempt to "examine and report upon the legal, social and ethical issues relating to euthanasia and assisted suicide" (32:5).[29] Witnesses, who included academics, organizations, associations, communities, and individuals who had a personal investment in the issue,[30] were asked to make a statement to the committee about these issues, and then to answer questions posed by the senators.[31] The hearings, which continued until January of 1995, provided the basis for the committee's recommendation in their final report, issued in June, 1995, that, in regards to assisted suicide and euthanasia, no amendments be made to the *Criminal Code* subsections 241 (a) or (b).

However, although ultimately the status quo was maintained in respect to any potential amendments to the *Criminal Code*, the majority and minority recommendations emphasize Lisa Hobbs-Birnie's point that "profound shifts . . . have taken place in social thinking on these issues within the last 25 or so years" (140). Although these profound shifts are challenged by the sanctity-of-life perspective—the belief that all human life is sacred—and the perspective that argues that "life is a fundamental societal value because society cannot survive if this value is not protected," it cannot be denied that there is a

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[28] Despite this decision, Sue Rodriguez committed suicide on February 12th, 1994. The physician who assisted her suicide was never named, but "at a press conference in Ottawa" on February 14th, "a distraught Svend Robinson [told] reporters that he was present when Sue Rodriguez died . . . He had held her in his arms as she slipped into unconsciousness. She had died peacefully and with dignity" (Hobbs Birnie 178). On March 15th, 1994, a "pathologist's report [revealed] that Sue [had] died of a massive overdose of morphine taken with Seconal capsules" (178).

[29] This statement is taken from the Committee's mandate, which was adopted on February 23rd, 1994.

[30] These witnesses ranged from specific communities, such as the Mennonite community, to the Cancer Society, A. L. S., the Alzheimer's and the AIDS groups, disability organizations, the Right to Die Society, and Dying with Dignity groups to individuals who had specific experiences with the issues at hand.

[31] The committee members consisted of the following individuals: The Honourable Joan B. Neiman Q.C. (Chair); The Honourable Therese Lavoie-Roux (Vice-Chair); the Honourable Senators, Gerald-A Beaudoin Q.C, Sharon Carstairs, Eymard G. Corbin, Mabel M. DeWare, Wilbert J. Keon, Joyce Lynch-Staunton, and Joyce Fairbairn (plus others original members—Senators Gigantes, Molgat, and Perrault—and numerous others who participated in the work of the Committee).

forceful move to recognize that quality-of-life, personal autonomy and self-determination are the absolute values by which society should be judged (*Special Senate Debate Final Report*).

Expressing a recognition of these changing and contradictory perspectives, the majority Special Senate decision made recommendations to the legislature that illustrated a tentative willingness to consider the legalization of assisted suicide and euthanasia.[32] First, in the case of assisted suicide, the majority position recommended that "research [should] be undertaken into how many are requesting assisted suicide, why it is being requested, and whether there are any alternatives that might be acceptable to those who are making the requests; the minority opinion wanted to legalize assisted suicide by adding an exemption to subsection 241 (b) that would "protect individuals who assist in another person's suicide."

Again, while the majority of the committee members rejected voluntary euthanasia, believing that "it could create serious risks for the most vulnerable and threaten the fundamental value of life in society," they also stressed that "the present penalties for this conduct are inappropriate where there is an essential element of compassion or mercy." Their recommendation was that while it should "remain a criminal offence, the "*Criminal Code* should be amended to provide for a less severe penalty in cases where there is the essential element of compassion or mercy." The minority opinion, maybe predictably, recommended "the Criminal Code be amended to

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[32] Euthanasia derives from the Greek term "eu," meaning "well," and "thanatos," meaning death. Literally translated, then, it means "the good death." The Euthanasia Society of America defines it as "the termination of human life by painless means for the purpose of ending physical suffering."

permit voluntary euthanasia for competent individuals who are physically incapable of committing assisted suicide."[33]

Distinguishing between non-voluntary euthanasia ("done without the knowledge of the wishes of a competent individual or of an incompetent individual") and involuntary euthanasia ("done against the wishes of a competent individual or a valid advance directive"), the committee recommended in the latter case that euthanasia should remain a criminal offence. In the former case of non-voluntary euthanasia, however, while recommending that it remains a criminal offence, there was a general consensus that in these cases "a third category of murder could be created that would not carry a mandatory life sentence but rather a less severe penalty; or a separate offence of compassionate homicide could be established that would carry a less severe penalty."[34]

This tentative support for the legalization of euthanasia and assisted suicide is indicative not only of changing cultural and societal attitudes concerning these life and death issues, but also the changing roles of institutions and the requirement that these institutions have for a certain type of individual. Speaking to the way in which cultural attitudes, beliefs, and practical constraints influence individuals and institutions, Doctor David Roy points out in his brief to the committee, that the notion that we live "in an ideal world of ideal hospitals, doctors, nurses and families" is to negate or ignore the chaos that dominates when these institutions are asked or expected to support "the

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[33] The essential difference between assisted suicide and voluntary euthanasia can be defined by the following *Special Senate Debate* definition: "In assisted suicide, it is the dying person who is the principal agent of death while in acts of euthanasia, the agent is another person." In the *Special Senate Debate on Euthanasia and Assisted Suicide,* however, both Margaret Sommerville and Dr. Keyserlingk argued that there is no difference between physician-assisted suicide and euthanasia. Adding to this debate, Dr Kinsella argued that "in the actual commission of assisted suicide, . . . the only significant difference from active euthanasia is that the physician is usually absent at the moment of the suicide."

[34] This argument has specific relevance to the Robert Latimer case, and his "mercy killing" of his twelve-year-old daughter, Tracy.

elderly, the physically handicapped, the mentally ill, the infirm, and the seriously impaired newborn" (*Final Report).* Because these individuals and institutions are constrained increasingly by moral, "emotional, psychological and financial pressures" (Dionne *Final Report),* there is a tendency within individuals, "within the practice of medicine, within hospitals, and within the health care system in Canada," to endorse the death of the "weak and inarticulate, the defenceless, . . . the ordinary people whose continued existence is resented by unsympathetic relatives or an unsympathetic health care system" (Roy *Final Report).*

While these moral, emotional, psychological and financial pressures compromise the philosophical demand for liberal-democratic neutrality, they also point to the real life practices that constrain and contain this debate in a liberal-democratic debate informed by the practices and theories of corporate capitalism. These practices and theories appear in the reading and interpretation of events and testimonies, and in the representation of individuals who are affected by the debate. In this debate, these testimonies and representations often stress an "increasing concern with the economic restraints on the health care structure [that] might lead to assisted suicide occurring more often than anticipated, were it to be legalized." In this scenario, budgetary constraints and the corporate demand for a progressive population that is able-bodied and able-minded might enable euthanasia to be used not only as a means to put an end to an individual's pain and suffering, but also as a socially-convenient end that is not justified by any means, but those dictated by economic advantage.

What I am essentially arguing here, then, is that these attitudes towards dying "drive the social and moral fibre" of Canada, prescribing not only practices most suitable

to contemporary corporate capitalism, but prescribing also individuals, who are most suitable to a neoliberal corporate ethic and the requirement for rational autonomy, individual self-interest, self-reliance, and self-determination. Given this emphasis, despite Senator Lavoie-Roux's concern at the beginning of the debate that the debate should not constitute a "Sue Rodriguez study" (*Special Senate Debate Committee Hearings* 1: 17), Sue Rodriguez stands in this debate, concomitantly and consistently, as a model of the type of citizen who is a prime candidate for euthanasia—given that the prognosis for her type of ALS was a steady loss of physical ability, for example, walking, speaking, swallowing, and breathing, followed by death" (*Final Report*)—and as a model for the type of "ideal" citizen, that stands for type of human life best suited to a liberal democratic milieu informed by corporate capitalism.

An examination of Margaret Sommerville's and Barney Sneiderman's representative *Special Senate Committee* arguments provide a basis for thinking about the way in which a contemporary neoliberal-democratic politics, through the philosophy and practice of assisted suicide and euthanasia, construct a "suitable" citizenship.[35] While Dr. Sommerville, erring on the side of a conservative, democratic, sanctity-of-life perspective, sets the stage for thinking about euthanasia's relationship to neoliberalism, and for how Rodriguez was constructed and constructed herself in this respect, Dr. Sneiderman's liberal, secular, quality-of-life perspective uses a rhetoric of liberty to establish how the medical institution, and bioethical medicine in particular, support euthanasia, and Rodriguez' decision, as the ultimate expression of individual liberty and individual rights. While both of these theorists offer specific insights into the larger social

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[35] For more insight into Sneiderman's perspective, see also, Sneiderman, Barney. "Latimer and the Supreme Court: Necessity, Compassionate Homicide, and Mandatory Sentencing." *Saskatchewan Law Review.* 64:2 (2001): 511-558.

significance of the euthanasia debate, their respective solutions suggest that, while the issue is somewhat unresolvable, it is, at the same time, moving towards a resolution that would enforce the systemic and systematic violent negation of non-normative individuals and, particularly for my argument, people with physical and cognitive disabilities.[36]

In her initial comments to the senate committee, Dr. Margaret Sommerville, the Director of the McGill Centre for Medicine, Ethics, and Law, used a metaphor of a stone thrown into a pond to describe how euthanasia is not only an individual issue, but one that affects "our whole society" (*Special Senate Committee Hearings* 6:2). It is the stone (the practice of euthanasia) that, for Somerville, demands an analysis of how the ripples (the consequences of the practice) affect not only an individual's reality, but the "factual realities, the scientific realities, the emotional realities, the societal realities" and the spiritual—as opposed to religious—realities of a "whole society" (3). In asking questions about how euthanasia affects these realities, Sommerville recognizes that euthanasia, as a practice, cannot be divorced from the specific culture in which it is endorsed, promoted, and practiced (3).

Because euthanasia is conceived as a modern response to the fear of pain, suffering, and death, and because it carries with it imperatives of compassion and mercy and the political right to individual self-determination, it maintains a "cloak of acceptability" (13). However, as Sommerville points out, euthanasia, as a practice, reveals more than individual and societal responses to illness and disability; it exposes

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[36] These non-normative people include, as previously stated, the aged, the infirm, disabled newborns, disabled infants and adults. Peter Singer, for example, argues that infants up to two years of age if they show any mental or physical disabilities are prime candidates for euthanasia, as are adults who are cognitively or physically disabled. However, on a less extreme note, it is important to note that economic restraints on the health care system mean that poor people, and people suffering with terminal conditions such as AIDS often cannot receive drugs for series infections or treatment. By extension, medical technologies, such as genetic manipulation, are making it possible to choose the sex of the individual who is to be born.

how, in the contemporary neoliberal milieu, the focus on a sanctity-of-life or on life as a "fundamental" (*Final Report)* or "transcendental value" (45)[37] is replaced by a focus on the quality-of-life, which has come to include, in the negative sense, "concepts such as 'a life not worth living' and even 'wrongful life'" (*Death Talk* 44).[38]

The quality-of-life principle, as a valid consideration, is often associated with the ethical decisions about the allocation of medical and governmental resources, but in association with euthanasia it is often used to argue that people with illnesses or disabilities, because they have no perceived "quality of life," as that quality is judged by normative standards, are "better off dead" (45). This "mechanistic approach to people" is, as Sommerville argues, typical of consumer societies. In a society that characteristically "disposes of worn-out or useless products," especially when these products result in economic loss (45-6), euthanasia, and death, in particular, becomes "a matter of management" (46).

In this way, euthanasia as a practice reveals how the neoliberal desire for "effectivity, efficiency, performance, with priority given to cost-effectiveness [and] consumption," creates a hierarchical demand for healthy, able-bodied, able-minded individuals, at the same time as it creates a concomitant rejection of those considered unhealthy, disabled or cognitively inferior (38). Relating this rejection to neoliberalism's concern with economic efficiency and the "costs" associated with market transactions, I

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[37] In this respect, Sommerville asks, "At the bedside you have to ask yourself three questions, two of which I believe society and medicine at large, with a capital 'M', has answers to; and then there is the third, the answer to which I believe we must seek. The first question is simply: Is life a transcendental value? Is it a value that literally transcends everything? The simple, clear-cut answer to that is 'No'" (*Special Senate Committee Hearings* 45). The second question, to summarize, is one of ethics—which ethics, religious or secular—(46), and the third question is, "are there circumstances, however rare, where the life, the suffering of a patient are such that it would justify or legitimise the shortening of a life?" (50).

[38] As Sommerville argues, "wrongful life was a claim for damages in tort, usually on the part of handicapped children; they artued that their very lives—that is, being born—constituted a damage for which compensation should be available through the courts" (44).

believe it is possible to argue that the cost for imperfect individuals, who can bring no commodities—not even their own labour—to the table, is that they are characterised by the low position they hold on the hierarchical economic and social scale, and by the vulnerability that this position implies. They can not only be taken advantage of by individuals who have more resources and influence, but they can also, more significantly, be taken advantage of by the translation of public and legal liberal-democratic values, such as equality and liberty, into competitive attitudes, public policies, and practices that ultimately negate the non-normative individual. For example, the practice of euthanasia, as that practice is perceived as an endorsement of democratic individuality and that individual's attempt to make an honest, morally upright and responsible choice concerning his or her life, might provide for some institutions and some individuals a practical and "just" option. It might also provide institutions and the individual's family with a solution to the economic dilemma of having to care for those who cannot work and contribute to market efficiency.

In relation to Rodriguez' situation, it is possible to see that, as Lisa Hobbs Birnie, Rodriguez' biographer, points out, although Rodriguez had "not been a career woman," her internalisation of competitive market values and concepts of utilitarian, productive forms of personhood led her to believe in her freedom to choose the form of her own death, when her life no longer had any value to her. Specifically, her feeling that "she would never feel grateful merely to be alive" (28) cannot be divorced from her "realization that she had no future, that all her dreams were just illusions" (29), and her belief that in fighting for the legalization of assisted suicide, she was in some way making a positive contribution to society: the only one she felt she could make given her

situation.

Unfortunately, as Hobbs Birnie writes, the attention that was paid to Rodriguez by the media, the medical establishment, and the Right to Die Society, encouraging her belief that "the taking of her own life [was] acceptable to society," foreclosed any awareness in Rodriguez that her beliefs might be constructed by a society that does not value non-rational, non-productive individuals. Compounded by her awareness that "her education was relatively limited" (13), by her belief that "if I cannot move my own body, I have not life" (27), and by serious financial considerations, presented to her as a result of her inability to work and her medical expenses, Rodriguez felt increasingly that because of her "corralled and crippled" life, her only option to her, as a responsible, individual agent able to "control" her own life, was "to deliver herself from a death without dignity" (37). In doing this, Rodriguez had no idea that she was helping to solve population and economic problems, and, specifically, the problem of welfare.

If this lack of awareness constitutes Rodriguez' blind spot, in that it "keep[s] away distracting images [that] might cause hesitation and infirmity of purpose," it does work to affirm or, in Walter Lippmann's terms, to "defend" the status quo, reaffirming unproblematically the world as we "expect it to be" (73). While this expectation celebrates diversity and difference, this celebration of diversity and difference is qualified in a neoliberal ethic by an individual's ability to compete in the market as independent, self-sufficient and contributing members of society. Individuals whose quality of life does not meet these demands are perceived and come to perceive themselves, as Rodriguez did, as economic and social burdens on the state and welfare system.

In her article, "Neoliberalism, the New Right and Sexual Politics," Leslie Hoggart

argues that neoliberalism's affirmation of diversity and difference is qualified by a negation of the welfare-based, contemporary "dependency culture," which is seen as a "cause of economic" and "moral decline" (149): it "encourages illegitimacy, facilitates the breakdown of families, and replaces incentives favouring work and self-reliance with perverse encouragement for idleness and cheating" (Thatcher 8). In this context, individuals requiring welfare in the form of social security or disability payments, are not welcomed for their diversity and difference, but are constructed as being costly, as having an inferior quality of life, and as being morally susceptible.[39] As a burden or even as a danger to the individual liberty and equality of those who *can* compete within a neoliberal framework—a framework that acknowledges the market and not the state as being the "best guardian[s] of political stability and freedom" (Hoggart 150)—these non-normative "others" must either be rehabilitated as productive "normal" members of society or eliminated from view.

Responsibility for this (re)orientation, no longer resting with religious institutions, now falls under a secular and neoliberal ethos, to the state, to the rehabilitation and medical industries, the nuclear family, and the individual. These institutions and individuals, working in league with one another, are given the responsibility of securing the "ability" of all persons, while producing in them a firm backbone of "moral values and recognition of duties" (Mouffe 121). Because, in a neoliberal culture, life and death issues are "viewed not only in the light of the individual's right to life, but in that of society's right for its members to have pleasant and productive lives" (Macklin 121), and because there is a general belief that a "normal" individual's life is "not to be lived mainly to support the growing numbers of hopelessly disabled, often unconscious people

[39] Henry Morgentaler made this argument when justifying the need for abortion.

whose costly existence is consuming so much of the gross national product," there is a growing justification for the need to dispose of those individuals who might not be capable or willing to dispose of themselves (121).

Manipulating the social norms of self-determination and self-responsibility to encompass notions of non-altruistic behaviour and a behaviour determined by a cost-and-benefit rationality is the first step in insuring that the existence of all rational or non-rational individuals is never costly or burdensome. This manipulative interventionism becomes effective when individuals are persuaded to monitor or police their own lives, and the lives of those individuals who are close to them, for maximum economic efficiency. More significantly, this interventionism becomes most effective when disabled or incapacitated individuals are able, as Henri-Jacques Stiker argues, to evaluate themselves "with reference to others, the valid ones" (134). Having internalised these values, these non-normative individuals see their own lives as a burden that needs to be disposed of.

Because Rodriguez was unable to find a cure, because she began to realize that she was not "different and somehow 'special'" (Hobbs Birnie 21), but different and inferior, as powerless and as abandoned as a "wounded animal," she began to conceive of herself as invalid, as an unaffordable hindrance to quality, efficiency, competitiveness, and individual and national growth (21). In this way, her oppression as a woman can be seen to historically parallel the oppression of people with disabilities. As a woman and as a disabled person, it is the perception and self-perception of her incapacity that marginalizes her, along with her limited social choices and constraints that she experiences as an eligible bearer of rights. As a disabled woman, she must "concede her

competence," and accept that her choices are constrained to choosing assisted suicide (Wolf 405). Within this arena, however, the fight to legalize assisted suicide gave Rodriguez a purpose; it transformed her from an "unknown, suburban housewife to a heroic, highly respected figure" (Hobbs Birnie 26). Her argument that she had a right to receive assistance to commit suicide (36), and her belief that it was "unethical not to provide euthanasia in cases when this would be required" (Sommerville *Death Talk* 15), became a narrative, as Hobbs Birnie points out, that challenged Canada's "cultural, moral, and ethical institutions" (6).

In making this challenge, Rodriguez' focuses on the unethical implications of a system that subjects her, and other people in her situation, legally, physically, and emotionally, to a "slow, inhuman death" (Hobbs Birnie 39). In order to emphasize this inhumanity, Rodriguez argued that "the deterioration which I am undergoing is acceptable to me, up to a point. Beyond that point, my life will have degenerated to mere biological existence. I will become a helpless victim of my illness and have to endure prolonged suffering, lasting many months or even years"(49). Prompted by John Hofsess, the founder of the Right to Die Society of Canada, Rodriguez fought, then, for the ethical right to "terminate [her] own life, to ask for or receive any assistance in ending [her] life" (49). Believing, with John Hofsess, that "compassion for a suffering human being [is] the highest good, and in an enlightened society, the giving of a merciful death for those who seek it is an act of love above and outside the proper realm of criminal law," Rodriguez was able, in her eyes, to ethically refuse her status as victim while, paradoxically, regaining some control over her life (46).

As Hobbs Birnie, Rodriguez' biographer, points out, it was Rodriguez' belief that

she had "no place in this corralled and crippled world" (27), her belief that "the quality of life is the essence of life, and . . . a life deprived of quality is not worth living" (37), that enabled her to efficiently plan and "accomplish her own 'self deliverance" by attempting to effect, legally, her own "quick and dignified" death (39). While this decision, in one sense, speaks to Rodriguez' liberal awareness that her life "belonged" not to the institutions of medicine or law, but to herself (43), it also, in another sense, reflects the institutional requirement that individuals embody the social norms of self-determination and self-responsibility, and that they, as individuals, apply a corporate cost-benefit rationality to their own lives: a rationality that weighs the economic, social, and familial costs of keeping these burdensome individuals alive against the practical benefits to society of encouraging their timely deaths.

To return to Margaret Sommerville's argument here, and her claim that it is precisely because this neoliberal consumer-based ethos develops a managerial or "mechanistic approach" to individuals, defining them in terms of the market as "objects" or things that have a certain amount of "use value," it is possible to justify the disposal of non-normative individuals on the basis that they are "worn-out or useless products" (*Death Talk* 45). As Somerville points out, death as an "outcome becomes mandatory when these [human] products result in economic loss" (46). It is because Rodriguez sees herself as "dependent and hopeless," as an unviable strain on the economy and a hindrance to those who care for her, that she becomes a mere product, a "[cog] in the wheel of production, that can be disposed of as cheaply and efficiently as possible once [she is] no longer [a] valuable [product or producer]" (46).

According to Sommerville, this attitude has implications not only for an abstract

ideological analysis of Canada's institutions, but also for real life practices. While euthanasia "recognize[s] persons' claims to freedom of choice, control over what happens to them and individual rights, all of which were emphasized in the Sue Rodriguez case," it also raises the question as to how these rights should be limited in the "interests of society itself" (*Special Senate Committee Hearings* 10).

As Sommerville argues, euthanasia raises some pertinent questions for Canadian society; however, it specifically raises questions about the role physicians should play in society. As Sommerville argues, "we believe that our doctors in Canada, to the vast extent, are caring, kind, moral people who act appropriately " (14). This medicalization of euthanasia "puts the very soul of medicine on trial" (Kass qtd in Somerville 14). Not only are we disturbing the physician-healer relationship, but we are pairing it with the role of "doctor-killer," or maybe, more appropriately doctor-death administrator (14). As Sommerville points out, having a physician and/or technology do the work for us serves the purpose of allowing all individuals involved to separate themselves from the act of killing, enabling them to avoid legal responsibility for their actions, while also "distanc[ing] them emotionally from what [they] are doing" (14).

Supporting this calculated distance, the language of euthanasia has created an environment where euthanasia becomes acceptable and even sought after. It functions as an abstract discourse, working, as Peter Gabel argues, to reassure and reinforce the "normal," as it "exists within contemporary capitalism," at the same time as it alienates individuals, and doctors in particular, from the act performed (262). It is this avoidance of responsibility and connection that allows individuals to argue that euthanasia is an ethical alternative to an [illegible]vidual's suffering and pain. As Sommerville points out, in many

cases, it is now considered "unethical not to provide euthanasia in cases where this would be required (*Special Senate Committee Hearings* 6:14). As a merciful or "ultimate act" of clinical care, the doctor's duty to relieve suffering is paramount to his duty to care for the patient. It becomes his duty to kill.

In this statement are echoes of Jack Kevorkian's mission in America, which, similar to Henry Morgentaler's, attempted to legalize or at least do away with any restrictions that pertain to assisted suicide or euthanasia. Between the early eighties and the late nineties, Kevorkian championed the individual's right to die, assisting almost one hundred patients, some of whom were not terminal, the majority of them were women. The Kevorkian case, then, raises additional questions concerning "what counts as an assertion of a right" and in what context, according to what diagnosis, should that right be asserted and by whom (Wolf 405)? Moreover, "in circumstances in which women and others who have traditionally lacked resources and experienced oppression are likely to have fewer options and a tougher time getting good care, mechanical application of the rights equation will authorize their deaths even when less drastic alternatives are or should be available" (405).

Agreeing with Susan Wolf in arguing that euthanasia has to be "unacceptable at the societal level because of the harm it would cause both to poor or disempowered women and to "some of our most important values and symbolism" (9), Margaret Sommerville insists that Canada needs a "new vision and practice of community" that would counterbalance the "intense individualism" that is at the root of neoliberalism's concomitant denial and obsession with death (10). To counteract what she calls neoliberalism's "marketing of death" for non-normative individuals (10), she proposes as

a solution, "a questioning framework . . . a framework of questions that will put us in touch with all of the realities that we need to be in touch with in terms of this issue . . . the factual realities, the scientific realities, the emotional realities, the societal and individual ones" (3). Specifically, she suggests that our "modern western democracies" need to engage in "death talk" (34). In this respect, she argues that

> In a post-modern, secular, materialistic, consumer-oriented, intensely individualistic, post-patriarchal, feminist-influenced, end-of-the-twentieth -century society—to name just a few of the characteristics—we have lost our death talk forums, which were church on Sunday, where there was one hour of death talk that was neatly confined. . . . Today, in Canada, our modern cathedrals are the Supreme Court of Canada and our Parliament. If you think for a moment about where the death talk is taking place, it is being debated in our Parliament, our Supreme Court; in other words, in our modern cathedrals. (8)

For Sommerville, this legal location not only alienates individuals from their relationship to death, it also reifies it in the concrete reality of legal and institutional authority. Consequently, Sommerville believes that as individuals, and as a country, "we need to talk about death. We need to feel that we have some control over death" (35): we need to find a space, outside of a corporate mentality, that will allow a space, not for religion, but "for spirit" (3), and we need to feel we have some control over the terms, definitions, and stories that structure our relationship to death (28).

Although Sommerville accounts for neoliberal influences on euthanasia, her ideal of establishing death talk forums that would value "a space for spirit" does not fully account for the power of institutions, government rationalities, and corporations intent on

policing and managing individuals for their own ends to provide terms, definitions, and stories that influence our relationship to death. Dr. Barney Sneiderman's perspective is indicative of his institutional affiliation with bioethics, and, as such, forms a good parallel to Sommerville's perspective, offering insight also into how this perspective might influence individuals, such as Sue Rodriguez. As a professor of law at the University of Manitoba, Sneiderman claims, in his submission to the Special Senate Committee, that he has developed biomedical ethics and medical legal ethics as an area of speciality, and takes particular interest in these life and death cases.

Like Sommerville, Sneiderman is concerned "with the big picture, by which [he] mean[s] how our society comes to grips with dying and death" (*Special Senate Debate Committee Hearings* 6:108). However, while Sommerville argues that euthanasia is out of step with other Canadian policies related to other measures of justifiable killing—"capital punishment, just war, and self defence", for example—Sneiderman argues that euthanasia is in step with the nation's need to establish a form of social planning or engineering that will take care of an individual's pain and suffering, at the same time as it will resolve problems with the Canadian health care system.

In order to support his appeal, Sneiderman quotes extensively from Sir Thomas More's fictional endorsement of euthanasia in *Utopia.* By implication, a utopian Canada would utilize euthanasia as a merciful response to pain and suffering. For those who have incurable diseases and are "full of continual pain and anguish," euthanasia constitutes a way in which doctors, "priests and the magistrates" can tell the "incurable" to

> dispatch himself out of that painful life, as out of a prison or a rack of torment, or else suffer himself willingly to be rid of it by others. And in

> so doing . . . tell him he shall do so wisely, seeing by his death he shall lose no commodity, but end his pain . . . believing this to be an honourable death.
>
> (More qtd in Sneiderman 108)

For Sneiderman, the notion that euthanasia is a cure for pain and suffering is more than a philosophical or intellectual argument; the potentiality of euthanasia lies in its utilization, its insertion into everyday beliefs, practices, and institutions, such as the health care system and the home. As a "model for our own "humane health care system," it is important, Sneiderman emphasises, to realize that it is not enough to move away from the current model of social control; it is folly simply to legalize euthanasia and leave it at that. Rather, what we have to do is build a structure to house a "humane euthanasia policy" (109). For Sneiderman, this means not simply keeping euthanasia as a "medical measure of last resort;" it means building "how we will die in the next (the twenty first) century" into our "health care system" (109).

In advocating for the institutional and legal acceptance of euthanasia, Sneiderman is supported by individuals in the medical establishment, particularly those who support bioethics. Although bioethics is viewed as an evolutionary development in medicine and traditional medical ethics, extending "beyond the realms of medicine and health care to encompass areas including environmental ethics, ethical issues of sexuality and reproduction" (3), it takes a particular form in cultural debates about sickness and disability.[40]

In that it concerns itself with "the beginnings of life and the end of life, with scarce resources and future generations, with the value of life and the relative value of

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[40] Bioethics also concerns itself with "what is sometimes now called 'genethics', the ethics of genetic choice and manipulation" (Harris 3). In this new science, it is possible for individuals to choose the gender of their offspring.

different lives" (Harris 15), it puts, "centre stage," a concern with "policy issues [ranging] from those concerned with health and research policy narrowly conceived to questions of public safety and the future of humankind" (16). In this respect, Harris points out that the bioethical "revolution in thought" enables, "for the first time in human history," the political, scientific, and social manipulation of "the course of human evolution" (20). This means "we can determine not only who will live and who will die, but also what all those who live and die in the future will be like" (20).

It is this desire to dictate the "type" of human most suitable to Western societies that pushes bioethics beyond a disciplined "bioethical inquiry" to the conscious creation of "bioethical activity:" the active establishment of a consensual rational foundation for all individuals, and the active incorporation of bioethical solutions into national and international governmental policies, institutional practices, the media, and the law. By using the agendas of "health care professionals, life scientists, philosophers, theologians, lawyers, economists, psychologists, sociologists, anthropologists, . . . historians, journalists, media presenters and politicians" (4), central bioethical concepts and ideas are disseminated to the general public.

In the Rodriguez case, bioethics informs the Right to Die movement that Rodriguez affiliated herself with. Having read "*Final Exit,* the best-selling suicide manual by American Derek Humphry, founder of the Hemlock Society," Rodriguez joined the Right to Die Society in Canada (Hobbs Birnie 37). Making a connection with John Hofsess, the society's executive director, Rodriguez came to believe, as Hofsess did, that "compassion for a suffering human being was the highest good, and in an enlightened society, the giving of a merciful death for those who seek it is an act of love

above and outside the proper realm of criminal law" (46). For Rodriguez, the "linked concepts of human rights and death with dignity," and the awareness of society's increasing inability to control the forces of medical technology, and the difficulty institutions are experiencing in resolving the ethical issue resulting from this technology" fuelled her belief that, as a rational, autonomous being, she had a right, even a responsibility, to decide what to do with her own body and life (42-3).

In this way, Rodriguez conformed to the idea, connected to the bioethical promotion of "a concept of human accountability and responsibility for human life" (Shewmon 148), put forward by many leading bioethicists, such as T. S. Englehardt, Joseph Fletcher, and Peter Singer, that an individual should, in a humanist attempt to attain "happiness for himself, his family, his countrymen, and all mankind," strategically plan, or allow others to plan, his or her own death (Englehardt 13). The benefits of this planning are two-fold: the sick and the infirm can die with "dignity," while those who are considered "close to death" can rest assured that they will not be an emotional, physical, and financial burden to society and the significant others who must care for them.

Justifying euthanasia as a moral alternative to living life as a burden, is bolstered in the liberal arguments of Peter Singer, a professor in the Centre for Human Bioethics in Monash University, who claims that because there is a type of living death—where people who are unconscious of life, either as a result of a coma or an intellectual impairment, are, in effect, already dead—some people are better off dead. Distinguishing between those who are "salvageable" (breathing and unconscious) and those who are disposable ("breathing and dead" [Singer *Rethinking Life and Death* 42]), between those who are a "waste of organs" and a "great burden . . . on their families, the hospitals, and

the community" and those who are worth saving, Singer argues that "an accompanied death, a socialized death, . . .a desired good death" is better than the living death experienced by those who suffer from physical and mental impairments (*Rethinking Life and Death* 27).[41]

Singer's "utopian" vision of a world populated by intelligent, able-bodied beings, which demands the elimination of non-normative others, is the flip side of the bioethic coin that purports to promote the liberation of human individuals from the constraints of nature, freeing them with the promise of a better life, and offering those who can afford the technology, an edge in today's competitive market. While individuals such as Justice Sopinka and Margaret Sommerville fear that legalizing euthanasia will lead to a slippery slope—the theory that posits that the legalization of euthanasia would make vulnerable and possibly endanger the lives of those whose lives are not valued—many bioethicists openly advocate for the move from passive euthanasia (letting die) to active, non-voluntary euthanasia (actively instigating death regardless of the wishes of the individual). While Singer argues that there is "little historical evidence to suggest that a permissive attitude towards the killing on one category of human beings leads to a breakdown of restrictions against killing other humans," he makes no apologies for what he perceives as the need to kill "those whose misery is needlessly prolonged" by living (*Practical Ethics* 217). As Singer argues, the slide from passive euthanasia to the active,

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[41] In Dr. Richard Sobsey's submission to the Senate debate, he identifies a "powerful euthanasia movement" that "almost" existed "in North America in the 1940s." Sidetracked only by "the vilification of the Nazi euthanasia program," this "plan which was proposed for many people in North America was published as an editorial in the *Journal of the American Psychiatric Association*. . . . It suggested that severely-handicapped children, . . . should be killed but not until their fourth birthday. The suggestion was made for humanitarian reasons because they did not want to make any mistakes. They thought that, if they killed children as soon as they were born, they might accidentally kill some who were not severely handicapped. They would give the kids until their fourth birthday to kind of shape up" (*Special Senate Committee Hearings* 18:141).

non-voluntary killing of non-normative—non-rational, non-autonomous, unselfconscious, non-normal (182)—human beings is justified because it can be argued that there are "[persons] who are not [members] of our species" (87).[42]

Barney Sneiderman, in his address to the Senate Committee, also affirms the inevitability of this slide, when he argues for a strategy that will make legal the consensual practice of non-voluntary euthanasia. Pointing out that in Canada there are many hidden assisted suicides performed each year, when doctors choose to deliberately give dying patients an overdose of morphine, he makes the argument that we already have euthanasia in place, functioning "as a mechanism of social control" (104). This is supported by the legal system, which, in practice, "tempers justice with mercy" when it comes to these medical "indiscretions" (105). Similar to proponents of the Rodriguez minority decision, Sneiderman refers to this hidden practice of euthanasia as the "status quo, arguing that "it may be that the status quo is the best that we can do, and that we leave it at that," or it might be possible to "view the status quo as a holding action that we keep in place while we ponder whether we can devise a better system of social engineering" (105).[43]

In an attempt to suggest a way of arriving at this "better system," Sneiderman applauds the strategic military planning of General Patten. He argues that Patten's strategies should be a model exemplar for proponents of legal euthanasia; similar to

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[42] Ironically, Peter Singer is best known for his work in the animal-rights movement. While he advocates for the non-personhood of some human beings, he advocates for the inclusion of some animals into the human category because of their ability to perform self-conscious, rational acts.

[43] In reference to this hidden and violent practice of euthanasia, the Committee "heard testimony that assisted suicide does take place in Canada" (*Final Report).* Russel Ogden and Dr. Boadway both stated that "assisted suicide takes place on a regular basis." In this respect, Ogden writes, "Between 1980 and 1993, I learned of 34 cases of assisted suicide and euthanasia amongst the AIDS population" in British Columbia. He goes on to state that "I also learned of other deaths outside of the AIDS population, but I did not include those in my data. . . . With respect to the situation in British Columbia, of the 34 deaths that I documented, . . . none of those deaths have resulted in criminal charges" (14: 75-76).

Patten, supporters of euthanasia should, according to Sneiderman, "plan very carefully and move cautiously," so that euthanasia can be firmly, legally, and uniformly ensconsed in the law and in the medical health care system. To this end, Sneiderman suggests that a "clear boundary" should be established, which endorses euthanasia for the terminally ill, but which takes into account the inevitable changing of "the eligibility category down the line" to include a sympathetic response to pain, suffering, old age, and even poverty (118).[44]

To support this argument, Sneiderman refers to what he calls the Kirchik principle: the case of June Kirchik, a breast cancer patient, who died "destitute, with no money for medical care" (106). He points out that the system, in not treating Kirchik, let her die. Arguing that there is little to choose between "killing and letting die," Sneiderman points out that the inequity of the health care system could, if euthanasia was made legal, be resolved by Kirchik's ability, as a "mentally competent" woman, to "come up with $50 to pay a physician for a lethal injection or a lethal dose of Seconal" to "cure" her of her "unbearable suffering that could not otherwise be relieved" (107). In this way, euthanasia as a "medical measure of last resort," is presented as a solution not only for the terminally ill, but also for those of a lesser—less conscious, less rational, less autonomous—class (and perhaps, gender) (107).

While it is possible to argue, in regards to the abortion debate, that the foetus is less human and hence, less worthwhile, and that certain foetuses may grow up to be less

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[44] This argument is reflected in the Senate Committee's Final Report , and the recommendation by one member that "Canadian society must move slowly on the issues of assisted suicide and euthanasia. A step-by-step approach is the more appropriate course of action. Assisted suicide is the first step because the principal agent of death is the dying person. Since that person has final control over the situation, there is an additional opportunity for that person to change his or her mind at the last minute. Voluntary euthanasia, on the other hand, should not be considered at this time since it may not be possible to design and put into place sufficient controls to prevent abuses."

useful, even dangerous, members of society, it is also possible to argue that those individuals whose quality of life is compromised, either by a debilitating, life-threatening illness or by physical or cognitive disabilities, would be "better off dead." In making this assumption though, bioethicists, doctors, and other supporters of euthanasia make the logical fallacy of assuming that they have, as an original premise, assured knowledge about what is in the best interests of others, whose experiences can be known unequivocally in relation to a fixed idea about what constitutes dignity, ability, and the quality of human life. This unconscious assumption points intuitively to the conclusion that the premises informing the attempt to legalize euthanasia are determined both by a conscious and unconscious engagement with discourses, practices and socially constructed beliefs that fail to consider adequately the way in which institutional, economic, and cultural assumptions about illness and physical and cognitive disability inform the debate.

The idea that there is a scientific, reliable, and economically beneficial way of assigning value and meaning to individual lives privileges a utilitarian, secular, quality of life philosophy and language over the traditional sanctity-of-life ethics promoted by religion and medical ethics. In this scenario, "philosophy itself [becomes] the medicine" (3) and language—the specific diagnosis of logically consistent premises and the contextual meaning of specific words, such as dignity, choice, and human—the means of diagnosing and prescribing who should or should not live.

Determining Relative Value: The Limits of Legal Citizenship

In contrast to Sneiderman's liberal secular standpoint, which makes the argument that legalized euthanasia offers a utilitarian, "logical" and secular alternative to traditional medical and religious sanctity-of-life arguments and practices by providing a "firm and reliable procedure" for determining relative value in terms of what or who is more or less human and in terms of who is more or less useful (Hare 1), Sommerville's conservative standpoint emphasizes caution. For Sommerville, although euthanasia as a practice raises the question about the extent to which individuals have a right to shape their own lives and deaths, it also, on a larger scale, asks questions about the extent to which the debate indicates a radical, and somewhat negative shift in many of society's values and understandings. While this warning was well taken by the Senate Committee, which, following the Rodriguez Supreme Court decision, ultimately affirmed the status quo, its tentative recommendations to conduct further study into the area, indicate that while these respective opinions keep the debate in agonistic conflict, there is also a movement to resolve the issue by legalizing or continuing to turn a blind eye to assisted-suicide and the violent practice of voluntary and non-voluntary euthanasia.

In this respect, the recommendation—seen repeatedly in the trial decisions and the senate debate—that, in the case of non-voluntary and involuntary euthanasia,[45] " a murder motivated by compassion or mercy" should receive a "less severe penalty" than the usual charge of first-degree murder creates "serious risks for the most vulnerable and

[45] Once again, non-voluntary euthanasia can be defined as euthanasia that is "done without the knowledge of the wishes of a competent individual or of an incompetent individual," while involuntary euthanasia can be defined as euthanasia that is "done against the wishes of a competent individual or a valid advance directive" (*Final Report).*

threatens the fundamental value of life in society" (*Final Report*).[46] Making the assumption that some individuals lead lives that are "not worth living" or that some individuals are "better off dead," even if it is shrouded in a liberal and caring rhetoric of compassion or mercy, enables a tentative antagonistic closure to the agonistic debate, posing a specific threat to those individuals who are aged, chronically ill or cognitively and physically disabled.

Speaking to some of these assumptions, Gary McPherson, in his comments to the Senate Committee, exposes how this rhetoric of compassion is hierarchically and unequally structured in respect to people with disabilities:

> Canada has identified a suicide problem among its youth, and we have responded "How can we prevent it?". Canada has identified a suicide problem among Aboriginal peoples and we have responded "How can we prevent it?". Canada has identified a suicide problem among people with disabilities and we have responded "How can we assist them to kill themselves?".
>
> (*Final Report*)

Pointing to the specific problem that this liberal-democratic rhetoric of compassion presents for people with disabilities, McPherson exposes the hypocrisy of a nation that preaches equality and liberty for all its citizens, but structures these citizens hierarchically and unequally. While revealing that this compassionate and caring rhetoric accords value unequally, he also, more importantly, suggests that justice is determined by dialogue—by the questions we ask, and how these questions are answered—and, inevitably, by the

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[46] The Senate Committee, reflecting on "killing[s] motivated by compassion," argued that "Juries are often reluctant to convict in cases where the crime is motivated by compassion or mercy and in particular when they involve someone who is in the final stages of his or her life. This often leads to plea bargaining resulting in a charge of a lesser offence or to a suspected offence not being prosecuted. Thus, the actual practice of the law does not coincide with the letter of the law."

narratives that locate and give meaning to individual experiences, positioning them firmly within the legal prescriptions and rules of law that legitimate the normatively-established "world in which we live" (Cover 68).

From a normative perspective, Sue Rodriguez' central rhetorical questions, "Whose body is this? Who owns my life?", require no answer (Hobbs Birnie 50). Read in this normative sense as a narrative that affirms her identity as a rational, self-determined individual, the answer is that her body and life obviously belong to her. However, in this case, Rodriguez' body and life becomes the site where legal prescriptions and rules informed by a sanctity-of-life perspective conflict with legal prescriptions and rules informed by a quality-of-life perspective, both of which attempt to determine their own version of reality (including a version of human personhood), and prescribe, for the general public, their own rules of human behaviour. Read from this perspective, Rodriguez' belief that her body is her own is an illusion. This illusion speaks to the way in which Rodriguez' perception of herself and her rights are always already contained within ideology's unspoken, "recognized bounds," and the hidden and normative demand for a certain type of subject, who has at her disposal a functioning, able body (Bruner 11). Moreover, because Rodriguez' questions evoke a "familiar, conventional [reality]", a narrative that affirms the able-bodied, autonomous subject, it also points ironically to the way in which this reality is defined by the unfamiliar: the unconventional body and life that functions in this narrative as an "offending deviation," a body and life that has no place in the normative world that Rodriguez imagines and in which she would like to live (12).

In that assisted suicide and euthanasia, similar to the abortion debate, are narratives that participate in conversations about "familiar," conventional subjectivities, they work to unite the nation as a coherent ideological whole. Shaping the choices and attitudes of "rational" individuals, such as Sue Rodriguez, these narratives maintain the status quo, at the same time as they work to define the limitations of pluralistic, liberal-democratic inclusion. Speaking to these paradoxical liberal-democratic constructions, the Latimer case—involving Robert Latimer's mercy killing of his twelve-year-old severely-disabled daughter, Tracy—raises questions about the limits to legitimate subjectivity, practices, and, concomitantly, legitimate criminality, within the Canadian nation. Indicating a slippery downward progression,[47] the Latimer case can be said to fulfil both the fears of Sopinka (et al) and the vision of Sneiderman (et al). In that this case, similar to the Rodriguez case, might "[leave] open the potential for the growth of a macabre speciality . . . reminiscent of Dr. Kevorkian and his suicide machine,"[48] it exacerbates fears that such practices might compromise "the government's objectives of preserving life and protecting the vulnerable" (*R. v. Rodriguez B.C. (SCC)*. Concomitantly, however,

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[47] Here I am gesturing to the "slippery slope" theory, which in rhetorical terms is a logical fallacy in that it makes the argument that an event must inevitably follow from another without any argument for the inevitability of the event in question. In relation to the debate about euthanasia, the slippery slope argument asserts that the elimination of defective or unwanted foetuses will inevitably lead to the elimination of unwanted poor, old, chronically ill or disabled people. In most cases in the slippery slope theory, there is no reason given for the series of steps or gradations that lead from one event to the other. This project attempts, then, to provide an analysis of the steps that construct this slippery slide from abortion to euthanasia .

[48] To reiterate, Dr. Jack Kevorkian, an American pathologist, publicly fought for a person's "right to die." To this end, he assisted nearly one hundred patients to commit suicide in a period ranging from the late eighties to the late nineties. In each of these cases, the individuals themselves took the final action which resulted in their own deaths. Dr. Kevorkian allegedly assisted by attaching the individuals to his homemade "Thanatron" machine (death machine): a machine that delivered the euthanazing drugs to the individual when they pushed the button. After Kevorkian's medical licence was revoked, making it hard for him to get the euthanazing drugs, he invented the Mercitron (mercy machine), which administered carbon monoxide to individuals through a gas mask. He is currently serving a prison sentence for his practices. Interestingly, in terms of the slippery slope theory, he advocated for the euthanasia of criminals, arguing that they should be given the choice to die. Significantly, Kevorkian is frequently invoked in Canadian euthanasia and assisted-suicide cases. For example, shortly before Robert Latimer killed his daughter, both he and Laura Latimer wished for a "Kevorkian," who could "take care of" their daughter, Tracy.

it facilitiates the vision of a "new world order," similar to the utopia imagined by Sneiderman and St. Thomas More: a place where voluntary or exhorted death, when there is no hope of recovery or normality, is the best and only option (*Special Senate Committee Hearings* 6: 53).

Significantly, the Robert Latimer case exists, as Ruth Enns argues, as a "flash point in the Canadian debate on assisted suicide and euthanasia," bringing these issues into focus by forcing a consideration of mercy killing and the role it might play in "dealing with" people with disabilities who, as Enns puts it, are "unable to speak for themselves" (8). The extent to which this case can be seen to endorse liberal individualism and paternalistic policies and practices is, I argue, the extent to which it is able to endorse Latimer's mercy killing of his twelve-year-old daughter, Tracy. Moreover, I consider this case and its representation of people with disabilities by examining how and why this particular legal narrative constructs, as the antithesis of the familiar, "normal" body, the body that is unfamiliar, and "abnormal." By strategically putting, not so much Latimer, but Tracy on trial, this case speaks to the power of language and narrative to evoke the model of the non-normative or abnormal body as a strategy for implementing the systematic rhetorical and actual elimination of people with disabilities.

"Compassionate Act[s] of Kindness"? Mercy Killing and The Robert Latimer Case

On October 24th, 1993, less than a month after Sue Rodriguez lost her Supreme Court bid for a constitutional exemption that would have enabled her to obtain the help of a physician to commit suicide, Robert Latimer, a Saskatchewan farmer, killed his twelve-year-old severely disabled daughter, Tracy, by putting her into the front seat of his truck and poisoning her with carbon monoxide gas. Although he tried initially to cover up his crime, an autopsy revealed that Tracy had been killed, and Latimer confessed to the murder. His stated motive for killing his daughter was to put an end to her "constant pain." Given that the murder was premeditated, Latimer was charged with first-degree murder. In the first 1994 trial, Justice Wimmer rejected the first-degree murder charge. He argued that Tracy's disabilities were evidence of her "bleak existence," and called the murder a "compassionate act of kindness" (*Her Majesty the Queen and Robert W. Latimer* 1994). Because Canadian law does not allow for compassionate homicide, the charge was dropped to second-degree murder, with the possibility of parole after ten years.

Mark Brayford, Latimer's lawyer, appealed the decision, but the appeal was denied. Immediately Brayford lauched a new appeal to the Supreme Court, first, on the grounds that Latimer's confession should not have been admitted as evidence,[1] and second, on the grounds that the crown prosecutor Kirkham had obstructed justice through jury tampering. Kirkham had asked RCMP officers to gather information from prospective jurors about their position on a number of issues, including their religious

[1] This was Brayford's third attempt to rule the confession inadmissible. The first two attempts were in a pretrial appeal to the 1994 trial and at the beginning of the 1994 trial.

views, and their views on abortion and mercy killing. Although the confession was found to be admissible, Kirkham was "charged with attempting to obstruct justice under s. 139 (2) of the Criminal Code" (News Release June 26 1996), and because of this, a new trial was ordered. The second trial, which ran from October 27th to November 5th, 1997 with the new crown attorney, Eric Neufeld, covered the same ground as the 1994 trial. Again, the verdict was second-degree murder. However, in his judgement, Justice Ted Noble gave Latimer a constitutional exemption based on S. 12 of the Charter (cruel and unusual punishment), sentencing Latimer to two years, one of which could be spent on his farm. The Crown appealed the sentence, while the defence appealed the verdict. Six disability rights organizations applied for and were given intervener status.[2] In 2001, the Supreme Court of Canada upheld the lower court ruling stating that Latimer must spend at least ten years in prison, arguing, in response to the "pain and suffering" argument articulated in the Defence of Necessity, that "there was *nothing* in [Tracy's] medical condition that placed Tracy in a dangerous situation where death was an alternative" (*R v. Latimer. (SCC)* 2001).

Given that Latimer had premeditated and murdered his daughter, one might be lead to believe that the eventual conviction of second-degree murder in 2001 implies that justice was done. However, the controversial rhetoric surrounding his confession, the two trials, the two appeals, and the judicial decisions are a testimony not to justice, but to the power and complexity of the contemporary agonistic debate surrounding the issue of assisted-suicide and euthanasia. Of central concern to this debate, which has continued to this present day, are questions related to the ideological issues that assisted suicide and

[2] These were the Saskatchewan Voice of People with Disabilities, People in Equal Participation (PEP), the Council of Canadians with Disabilities (CCD), the Canadian Association for Community Living, DAWN Canada: DisAbled Women's Network of Canada, and People First of Canada.

euthanasia pose for contemporary society. Pertinent to this discussion are questions about narrative representation: how these representations establish constitutive inclusions and exclusions, which support the "truth" claims of those in power, while effecting a visual, invasive bodily surveillance of the non-normative body. Constructing and legitimating a consensual moral and ethical normative model of personhood and citizenship that rests, problematically, upon the political, social and ethical negation of the non-normative body,[3] enables those in power to justify and authorize the imaginary and literal bodily invasion of non-normative individuals.

While the Morgentaler and Rodriguez chapters focus, then, on how political and economic demands function at an ideological level to determine how policies and practices construct and manage the normative population through the liberal concept of free choice and through the political demand for a certain "type" of subject, this chapter looks specifically at how political and ideological policies and practices manufacture the inhuman object—not even a subject—through the creation of a certain "type" of human body. By evaluating or referring to Tracy Latimer not in terms of her rights as a person, but in terms of her body, in constructing her as an unknowable body, "distanced from us, unlike us, threatening to us, far from us," the legal narratives about Tracy refuse her a human identity and the human rights that the possession of a human identity implies (Hyde 4).

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[3] Here it is important to distinguish between the person, and its implication of citizenship, as that citizenship implies "certain legal rights and responsibilities" (Yogis 202), and the body, which in law has little to do with being human, implying rather, "an inconsistent and incoherent assortment of representations and visualizations, deployed to solve political problems internal to legal discourse" (Hyde 4). From this perspective, Tracy's human identity is sacrificed as her body is deployed to solve the political problem that euthanasia presents to contemporary Canadian politics.

By examining the construction of the "normal" and the "abnormal" body in Latimer's confession, in the 1994 trial, in the 1997 decision, and in the 2001 Supreme Court decision, I argue that the conceptual legal framework perpetuates the normal, able-bodied status quo, while negating the non-normative, dis-abled body, which in this case is the representative body of Tracy Latimer. By using strategies and techniques of identification, classification, and metaphorical representation, and by framing these techniques, paradoxically, within rhetorical constructions of love and pain, these narratives create a fictional representation that not only negates Tracy's life and experiences, but also provides the justification for her elimination, figuratively and literally, from a collective "normal" vision.

Robert Latimer's Confession of Murder

Robert Latimer's confession of murder was central to the ensuing trials—both the 1994 and the 1997 trial—and the subsequent appeals. The extent to which Latimer's clear and unapologetic recounting of the events appeared, in the beginning, to ease the path for the crown counsel's conviction of Latimer, providing him with hard facts on which to argue his case, it also, more significantly, presented Robert Latimer's defence counsel, Mark Brayford, with a problem. Latimer's open admission of premeditated murder meant that Brayford had to strategize his representation of Latimer and Tracy in ways that might not have been necessary had Latimer not confessed. Although Latimer rescinded his confession and pleaded not guilty to the charge of first-degree murder, Brayford was ultimately unsuccessful in his repeated attempts to have the confession ruled inadmissible. Aware that the confession would significantly help the Crown's

argument, and the onus on the Crown to prove Latimer's guilt beyond a reasonable doubt, Brayford pleaded a defence of necessity—an argument that stated Latimer had no choice but to kill Tracy—and the novel defence, that Latimer had the legal right to decide to commit his daughter's suicide for her by virtue of her "complete absence of physical and intellectual abilities." Latimer's claim that he was not guilty of first-degree murder, effectively meant that he was, in a similar way to Sue Rodriguez, openly challenging the law's prohibition against assisted suicide. The difference, however, was that he was not, like Rodriguez, petitioning for someone to help him, as a rational autonomous adult, to commit suicide, but that he was petitioning, *after the fact*, for his legal right as a rational, autonomous adult to help his daughter, a non-rational child, to commit suicide. Brayford's job at this point was to discount the murder charge prompted by Latimer's confession by playing on the largely emotional rhetoric contained within the confession. His aim was to prove that Latimer had really intended, as a good and loving father, to help his pain-ridden and severely-disabled child commit suicide: something that Brayford, in his novel defence, argued was "necessary," given Tracy's severe pain, and her "complete absence of physical and intellectual abilities" that prevented her from articulating her desires (*Her Majesty the Queen and Robert Latimer*).

To give some background to the case, it may come as a surprise, first, that given that Brayford, Latimer's defence lawyer, consistently portrayed Latimer as an honest, caring man, that Latimer did not immediately confess to murdering his daughter. Having decided to kill Tracy on the twelfth of October, 1993—the day Robert and Laura had a doctor's appointment to talk about surgery on Tracy's dislocated hip—and having spent

the intervening two weeks planning the murder, Latimer put his plan into effect on the 24th October, the day his wife and their other three children were at church.

Carefully planning the murder, he aimed at first to hide it from his wife, children, and the law. Constable Nick Hartle, who was first on the scene, stated that Laura told him that when she got back from church, "she went into the bedroom and she found Tracy. . . . Bob interjected and said that he'd put her to . . . bed for a nap around 12 to 12:30 and he said that she'd been in some pain and discomfort" (*Her Majesty the Queen and Robert W. Latimer* 1994 87). Having informed the officer that Tracy had "passed away in her sleep" (83), he told the officer that he wanted Tracy to be cremated (91). Mrs. Latimer appeared shocked and shaken by the suggestion but after a private discussion with Latimer in their bedroom, she came out and advised the officer, "Yes, we want her cremated" (93).[4] However, because no apparent cause of death could be found, an autopsy was performed on Tracy. This autopsy revealed that Tracy had been poisoned, her blood indicating "an eighty percent saturation level . . . of carbon monoxide" (270).

At this point, the R.C.M.P. had to treat the case as a homicide investigation. On November 4th, 1993, the police took Latimer into custody. During his interview, Latimer repeatedly refused counsel. However, he eventually confessed "to his role in causing Tracy's death," and, later that day, he took the officers on a videotaped "walk through" of his farm, pointing out the truck, hoses, rags and other equipment that he used in terminating Tracy's life. As Corporal Lyons gave testimony in the 1994 trial, when Latimer did confess, he explained to the officers in a "composed" manner not only how

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[4] While this event implicates Laura Latimer, she was never charged with attempting to obstruct justice. This may be in part because Latimer repeatedly told the police officers and the courts that Laura was not involved in planning—except in a "general sense"—or committing the murder.

he had killed Tracy, but also how he had planned the murder, and concealed the evidence (292).

Because Latimer openly admitted to planning and murdering his daughter, Randy Kirkham, the crown prosecutor, after reviewing the confession, charged Latimer with first-degree murder. In doing this, Kirkham was following the Saskatchewan Department of Justice guidelines, assuming that there was a "reasonable likelihood of conviction," and that, given the premeditated aspect of this father-daughter murder case, the conviction would be in the best "public interest" (*Saskatchewan Dept. of Justice* qtd in Mitchell 500).

Thus, Latimer's confession to premeditated murder presented Mark Brayford, Latimer's defence attorney, with a problem (Mitchell 502). Recognizing that the charge of first-degree murder could possibly succeed at trial, he attempted, prior to the commencement of the first 1994 trial, and again at the beginning of this trial, to have Latimer's confession ruled inadmissible. Among other objections, Brayford argued that "Latimer's statements were not voluntary in the legal sense because they were elicited by means of coercive psychological pressure and, therefore, should be excluded" (*Her Majesty the Queen and R. W. Latimer* 1994 180).[5] Latimer's confession, he argued, broke Section 7 of the Charter, as well as the "traditional confession rule" because it "could not be relied upon as being truthful." Delivering his judgement on September 27th, 1994, Justice J. Wimmer admitted that "there was psychological pressure brought to bear by the investigators in the hope of obtaining information," but he also concluded that "it did not

[5] Brayford also claimed that Latimer's right to be "not be arbitrarily detained and imprisoned" under s. 9 of the Charter was violated, and that his right to counsel under s. 10(a) of the Charter—"the right to be informed of the reasons for his arrest"--was infringed. These appeals were also unsuccessful.

amount to trickery and it did not operate unfairly to deprive Latimer of his right to choose whether to remain silent in the face of questions being put." The appeal was dismissed.

In theory, this appeal raises the question as to whether the criminal confession—defined as a voluntary acknowledgement of guilt in relation to the crime charged (Yogis 55)—can be read, in Michel Foucault's terms, as a reliable truth "that demands to surface" (*History of Sexuality* 60).[6] In this case, the "truth" of Latimer's confession is compromised not only by the larger context of his previous dishonesty in trying to cover up the crime, but also by the coercion of the officers who examined him, and by Brayford's attempt to have the confession ruled inadmissible. In relation to this context, then, the criminal confession can be seen less as an "effect of a power that constrains us" (55), and more as evidence of the inability to fix meaning in the "new games of truth, power and ethics" that inform both our judicial and liberal-democratic reality (Rabinow and Rose xxxi). Another way of looking at this is that the confession becomes in the hands of the law not only a tool for classifying, judging and possibly punishing (Foucault *Discipline and Punish* 184), but also in the hands of the individual a valuable tool that can be used to regulate and govern the general standards by which we live and see the world.

In practical terms, the ruling that the confession was admissible left Latimer's defence attorney, Mark Brayford with two options: he could have his client plead guilty, claim that Latimer was an over-burdened caregiver, and plea bargain for a lesser charge

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[6] In *The History of Sexuality Vol. 1,* Michel Foucault argues that "Western societies have established the confession as one of the main rituals we rely on for the production of truth" (58). Playing its part in "justice, medicine, education, family relationships, and love relations," the confession, Foucault points out, is one of the culture's main disciplinary measures to regulate "one's crimes, one's sins, one's thoughts and desires, one's illnesses and troubles" (54).

of manslaughter,[7] or he could plead not-guilty, claim a defence of "necessity," and assert that public interest supported this plea. The first option was all but nullified by Latimer's confession, and by Kirkham's charge of first-degree murder. Even if Brayford had been able to challenge Kirkham's decision by pointing to comparable cases where similar deals had been made, the outcome would have been compromised by Latimer's admission that he was not an overburdened caregiver,[8] and by Latimer's publicly-stated belief that killing Tracy was not a criminal act.[9] However, Brayford's choice not to offer a plea to manslaughter meant that the case would go to trial and that discretion would be passed to the jury (Roach 473); hence, the outcome would not be assured.

Given the impossibility of the first option, maybe it is not surprising that Brayford chose the second option, the defence of necessity, which made the "unique" or "novel" claim that Latimer had no choice but to murder Tracy, considering her "complete absence of physical and intellectual abilities" (Brayford qtd in Roach 477).[10] Juxtaposed

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[7] This has been the case with other "compassionate homicide" cases in Canada. In the 1997 trial, Justice Noble provides five examples of intentional mercy killings. While all of the perpetrators in these cases were initially charged with first-degree murder, they all had their charges reduced to the lesser charge of manslaughter as a result of plea bargains. Graeme Mitchell, in his article, "No Joy in This for Anyone: Reflections on the Exercise of Prosecutorial Discretion in R. v. Latimer," critiques Noble's assumption that these cases set a precedence for leniency for Latimer by arguing that all but one of the five cases were in the final stages of life: In the case of *Mataya*, the victim was in a permanent coma; in the case of *de la Rocha*, the victim was a seventy-year-old man suffering from respiratory illness; in the case of *Morrison* and *Myers*, the victims were in the terminal stages of cancer (503-4). Of all the people he cited, *Brush*, was the only victim who was not at the end stage of his life, and he was an eighty-one year old man, who had Alzheimer's disease (504). According to Mitchell, these victims are not comparable with Tracy, a twelve-year-old girl, whose condition was not progressive or terminal.

[8] Indeed, Latimer stated that his financial support for Tracy was not a problem "in the least", and that, although he had access to institutional placements for Tracy, he did not consider this to be a solution for Tracy in the long term.

[9] On December 16th, 1993, Latimer gave an interview with *CBC*, stating he had committed no crime. Also, on June 14th, 2000, he told the *Regina Leader_Post* that "there was no crime", and likewise on 19th January, 2001, he told K. Makin, from the *Globe and Mail*, "this is no crime . . . I didn't do anything wrong" (Mitchell 507). This could have been a strategy, since Latimer did not utter these claims immediately, but only after the defence strategy of eliciting public support for the crime was put into place.

[10] Brayford's address to the jury suggested that if Latimer had the right to decide whether torturous medical procedures could go ahead, then, "we shouldn't be so quick to suggest that he doesn't have the right to make decisions about Tracy's life" (*Her Majesty the Queen and Robert Latimer* 682). The disability-rights

against Tracy, who is figured through "lack"—both her lack of reason and her lack of an able body—Latimer becomes the able bodied voice or subject of reason. As a surrogate decision maker, he is the one who knows and who can reason for Tracy, and he is the one who, by virtue of his able body, can commit the murder that Tracy is unable to do herself. In this discourse Tracy becomes known as a "complete absence;" she is killed in Brayford's rhetoric and in her father's narrative as effectively as she is killed by her father on his farm.

Countering this surrogate argument, however, the Disability Rights Coalition, intervening in the Saskatchewan Court of Appeal and in the Supreme Court of Canada appeal, attempted to dispel some of the myths and assumptions that people hold about people with disabilities. Arguing that it is a myth that people with disabilities "exist in tragic and unbearable circumstances," they stressed that Tracy's life was not defined by pain (Heavin 616). Moreover, they stated that her pain could not be seen as distinct from her disability: "her pain was caused by her disability and was a feature of it" (Coalition factum qtd in Heavin 619). Because many people live with pain, Tracy's case was not "unique" (619). In this respect, the Coalition argued that "it is dangerous to base legal conclusions on one person's perception of another individual's ability to tolerate pain, or on his or her perception of the impact of that pain on another person's quality of life"

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coalition countered this argument with the claim that this "view runs counter to the fundamental proposition that children have rights that must be determined independently from their parents." In making this claim, they were referencing the *United Nations Convention on the Rights of the Child,* and Article 6—"every child has the inherent right to life . . . parties must ensure to the maximum extent possible the survival and development of the child"—and Article 19, "parties shall take all appropriate legislative, administrative, social, and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other persons who has the care of the child." Article 23 was probably most significant: "parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community."

(619). Further calling into question these assumptions, they stress that a pivotal question, is to ask, "if the child were not permanently disabled, but in extreme pain, would there be any question about making heroic efforts to sustain and maintain life?" (619).

Speaking to this ability-disability divide, Kent Roach points out that Latimer's "novel" defence, which argues that Latimer would not have killed Tracy had she not been severely disabled and in pain, is similar to Rodriguez defence, which argues that her disability, brought about by her disease, would prevent her from taking her life when she wanted to. In that both of these cases claim first that the law discriminates against the disabled individuals, and second, that the suicides were "necessary," they are similar; however, they are different because unlike Rodriguez, Tracy Latimer did not give her consent. When Rodriguez' failure to win parliamentary support for her request to receive help to commit suicide is compared to Latimer's essential attempt to "legalize parental discretion over the life and death of children," it is possible to see that the Latimer case "is even more fraught with legal and ethical concerns, particularly on the matter of consent" (Strange 570).

Claiming his status as a merciful surrogate decision maker for his daughter, Latimer insisted that the scheduled hip surgery and the consequent pain constituted an imminent peril for Tracy. This claim was ultimately overruled by the court, who decided that the pain would have been medically manageable. Despite Latimer's claim that Tracy's unremitting pain reduced Tracy's quality of life, Justice Wimmer in the 1994 trial also decided that pain was not a reason for murder. Brayford did not pursue this "necessity" argument in the second trial, at least in part, because, as Kent Roach argues, he was influenced by the court's refusal to strike down the offence of assisted suicide in

the Rodriguez case. As Roach posits, "If the Court would not make an exception for Ms. Rodriguez who was a competent adult, it would not make an exception for Tracy Latimer who was not. The concern that competent people like Ms. Rodriguez might be coerced into suicide would be much greater in the context of people like Tracy Latimer, who cannot speak for themselves" (477).

The argument of "necessity," however, did allow Brayford in the first trial to speak for Tracy, utilizing a largely emotional rhetoric of pain, suffering, and necessity—strategies used in Latimer's confession—for his own, or Latimer's ends. In his confession, Latimer justifies the murder of his daughter, who "officially" suffered, according to Mark Brayford, Latimer's defence lawyer, from "a rare, progressive" and "severe form of cerebral palsy" (*Her Majesty the Queen and Robert W. Latimer* 1994 320), by claiming that his motive was to put an end to her constant pain. Latimer's particular focus on Tracy's pain and suffering, however, was prompted by the police, who, in an attempt to elicit a confession from Latimer, unintentionally provided him with what George Lakoff calls a "semantic frame": an unconscious "conceptual structure used in thinking" that evokes a context and certain fundamental value or "truth" ("Simple Framing").

By evoking the concept of pain within the context of Latimer's own pain as a loving father, "who did what he had to do," and within the context of Tracy's pain that was indistinguishable from her disability, and by reading both of these contexts as undisputable facts or "truths," the officers not only affirm to Latimer that pain was his reason for killing Tracy, but also, inadvertently, that the frame of love, pain, and disability could be used as a political strategy in Latimer's defence.

This rhetoric of love and pain, then, provides, in one respect, the initial context for the police officers as they attempt to elicit a confession from Latimer, and, in another respect, a context, a perfect vehicle, for Latimer himself, as he attempts to defend his actions. Informing this particular semantic frame is the unconscious, utilitarian and normative belief that people with disabilities are a burden to the family and the welfare system, who have to jointly bear the responsibility of their care and medical costs (Hardwig 106). This inferential knowledge makes understandable the reason why it is not Tracy's pain, but Latimer's pain as an overburdened, loving father that is fore-grounded in this initial examination. For instance, Latimer's emotional pain provides a focus for the officers as they tell Latimer that they "realize this is a very trying time for [you] and [your] family," that they are "not [there] to judge [him], . . . they understand the situation [he] is in," and they empathize with him (*Her Majesty the Queen and Robert W. Latimer* 1994 283).

Extending this frame of compassion beyond their immediate situation, these officers convey to Latimer that he was supported by the larger community. In this case, Lyons' reassuring comment that "we deal with situations like this frequently where people find themselves in difficulty and things that wouldn't ordinarily happen do," carries the unstated assumption that sometimes people, and fathers in particular, have to do difficult things: things they wouldn't ordinarily do (283). To add to this, Corporal Lyons extends the empathy that the officers felt to the people in Latimer's specific community, telling Latimer that "[we] have spoken to several people. Everyone said the same thing; that you were a very caring person, a good person" who "loved [his] daughter

very much" and who would have harmed her only if he felt "[he] had to do [so] out of love for [his] daughter" (284).

Contained within this empathetic, loving context or frame, what Lakoff and Johnson call a "container image schema," Latimer is able to imagine a sympathetic, paternalistic, and patriarchal community that may or may not be there (*Philosophy in the Flesh* 177). It is possible to assume, however, that by providing Latimer with an "overall conceptual structure" that speaks to the general sympathetic knowledge that "everyone has" concerning the burden that disabled children represent for families, Latimer was able to reason to himself that love and harm are necessarily contingent prepositions. In other words, given Tracy's pain and disability, Latimer's love for his daughter, makes harming her or killing her a logically causal preposition.

While an awareness of this sympathetic and understanding audience might well have encouraged Latimer to confess, it is not until Corporal Lyons, in his questioning of Latimer, instigates the initial consideration of Tracy through the specific medium of her pain that Latimer admits, indirectly, that he has killed his daughter. Specifically, it is not until Corporal Lyons' suggests to Latimer that his "daughter was in a great deal of pain" and that killing her was something "[he] felt he had to do" as a "loving, caring father" that Latimer eventually concurs and says, "my priority was to put her out of her pain" (285). Presented as an indisputable self-evident fact, Tracy's pain is portrayed as the context and the reason for murder, and, from this point forward, the concept of love (Latimer's) and pain (Latimer's and Tracy's) frames not only the police interrogation and Latimer's confession, but also the ensuing trials, judicial decisions, and the public perception of the case.

For example, most of Latimer's confession is informed by explications of Tracy's condition. When Latimer is asked to "start at the very beginning and go through exactly what took place," Latimer responds by stating "she's been in pain for years. Ever since she was born she's had trouble" (289). He goes on to describe Tracy in terms of her disability, which is figured as inseparable from her pain: "she had seizures from the day she was born. . . . She was severely effected by brain damage. . . . She was always stiff and in pain" (289). Elaborating on this, he speaks also about her in terms of her operations. He mentions the operation to "straighten her back," but it seems as though it was the operation on her hip, and the prediction of further pain, that was the instigating factor in Latimer's decision to kill her. After explaining briefly about the operation, stating that one of his major concerns was that "she'd be confined to a cast for I don't know what the time," he says that he "felt the best thing for her was that she be put out of pain" (290).

Tracy and her pain, then, it is possible to say, play a causal role in bringing about an understanding of what it means to be disabled and what it means to be a sympathetic, loving and caring father of a disabled child. In Lakoff and Johnson's terms, this central belief becomes the schema, the container or the normative structure for all other understandings of the case (*Philosophy in the Flesh* 177). While the law reinforces this normative structure, perpetuating, as Peter Gabel argues, the status quo, it also imagines Tracy and Robert Latimer in terms of their imagined inequality. Because the law hierarchically constructs subjects according to their rights and duties as "valued" citizens, Latimer becomes known in this discourse or frame as the "good" father, a man who was "driven to emotional extremes" (Corelli 48), while Tracy becomes known through her

"complete absence of physical and intellectual abilities" (*Her Majesty the Queen and Robert W. Latimer* 1994 286). Within this narrative of rhetorical and institutional affiliation and domination, Latimer's reality as an able-bodied and able-minded person who "acted out of a sense of responsibility, [and] did what he felt was right, did what he felt was necessary," is affirmed (286). Tracy Latimer's identity, however, as a person with disabilities, is negated. Figured in terms of lack or absence, her status as a non-person, a person who is not accorded the same equal rights as any other person in the eyes of the law, "has been grafted as a reified fact" (Gabel 275).

This negation is visible in large part in Latimer's confession, which is cited in the transcript of the 1994 trial. In his confession, Latimer relates, with a lack of emotion, his thoughts and actions leading up to and at the actual time of his daughter's death. For example, his objective and unemotional recounting to Corporal Lyons of how he had debated various methods of killing Tracy—"I thought I'd give her some Valium. I thought about shooting her in the head . . . and burning her body" before deciding to "put her in the truck" (294)—is surpassed only by his clinical "straight forward" narration of the actual event, "a rare occasion" when, in his words,

> I propped her up with rags by the steering wheel. I covered her over except for the face. I had to cut the hose with the hacksaw, hooked it to the exhaust, put it in the back window, had her propped up and put the hose in the back window, let it run. . . . I let it run till noon. I was timing all this stuff. There was a tractor tire in the back. I was sitting here watching through the back window. (290-1)

In this distanced and somewhat abstract narration, Latimer's desire to end his daughter's life is characterised by a curious combination of calculation and imagination. It is,

however, the conceptual frame of love and pain that makes this violence, while horrific, somewhat understandable and, for many individuals, acceptable: a sign of a man driven out of love for his daughter to imagine and commit murder. Because this frame has already enabled us to hierarchically construct Tracy as inferior, as a body in pain, her death becomes not only imaginable, but inevitable.

As the administrator of his daughter's death, Latimer exposes, in one sense, how the organization of death has become in contemporary society a method for individualizing and rationalizing not individual subjectivities, but individual bodies.[11] Once removed from the person, the "abnormal" body can be organized and manipulated in language and in practice to better sustain a normative shared vision of the world. In the confession, it is Tracy's body that reveals the limits of acceptable subjectivity, and the regrettable, but necessary consequences to those who are unable, even in "the face of death," to live their lives according to the autonomous functional norm.

As a "required" narrative, the confession, in a practical and philosophical sense, becomes a receptacle for storing and transmitting society's values. This transmission occurs first between participants—between the police officers and Latimer—through an apparent common consent, and second, through the transmission of the event to the larger culture. Establishing between the immediate participants a coherent frame or narrative allows them to form an alliance that purports, in legal and socio-political, and cultural terms, to tell the "truth" about the "practices" and the "administration of life and death"

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[11] In this respect, Michel Foucault argues that in modern times, "the ancient right to *take* life or *let* live has been replaced by a power to *foster* life or *disallow* it to the point of death" (*History of Sexuality* 138). Foucault associates this more ubiquitous power with twentieth-century eugenics practices and the genocide of millions by Nazi Germany in World War II. However, what Foucault calls the "eugenic ordering of society" (149), the idea of "disallowing" lives that constitute a threat to the biological and hereditary strength of the people and/or nation, is still present, in more subtle, liberally-conceived manifestations, in many 'acceptable' twenty-first century discourses and practices.

that the "dream" of modern powers has "construct[ed], inhabit[ed], . . . contest[ed] and regulated" (Rabinow and Rose xxx).

This life-and-death-dealing alliance, existing, as it does, within a male-dominated, able-bodied, institutional and empathetic framework, is built around and builds, as Michel Foucault points out, a "system of rules defining the permitted and the forbidden, the licit and the illicit" (*History of Sexuality* 106). In creating these rules, this alliance strategically deploys "special knowledges," such as the knowledge Latimer has of his daughter's pain and disability, embedded in specific discourses (mercy killing), and institutional agents, such as the police officers who conducted the examination and Latimer himself, to compel a reconsideration of the particular types of personhood and the particular types of bodies that are acceptable to a contemporary (neo)liberal democratic milieu.

It is possible to see here that Latimer can be characterised by a "double sense of subjection" (McLaren 146). In one sense, he is subjected, compelled by the officers to conform to institutional norms and tell the truth about himself as a "good," legal, moral subject; in another sense, he constitutes himself within this confession, in a similar way to Rodriguez, through the "slow surfacing of confidential statements" as a "good," legal, moral subject (Foucault *History of Sexuality* 59). Within this empathetic and tragic arena, Latimer is able to find a sense of himself, transformed from father to father-martyr. In this sense, he becomes another "Jack Kevorkian" (*Her Majesty the Queen and Robert W. Latimer* 1994 285), a physician to the sick who, out of compassion, played God, and helped to end a life (362).

Ironically, it is not so much Tracy's pain, but Latimer's pain and, concomitantly, his unapologetic insistence that what he did was right that drives this particular alliance and public sentiment in a (re)consideration of justice. The confession, which "has as one of its chief objectives to reproduce the interplay of relations and maintain the law that governs them," might be read as a useful and appropriate tool or tactic for Latimer's defence in that it not only reinforces the norm, but sets the tone and grounds for the ensuing legal debate in the courts (Foucault *History of Sexuality* 106).

The 1994 Trial: Legal Storytelling and the Construction of the "Other"

In the November 1994 trial—the trial that, similar to the confession, set the tone and framework for how the case would be discussed in the 1997 trial and subsequent appeals—Brayford developed his argument that Latimer killed his daughter out of compassion for her pain and suffering. Contextualized within the Special Senate Committee's debate on euthanasia and assisted suicide, which had been in process since February 23rd, 1994, and the related debate on what constitutes human personhood (a debate that had really been in process since the abortion debate began in the late sixties), what should have been a straightforward murder case became a Charter debate on the relative value of different "types" of persons in terms of who or who is not deserving of life and liberty, and who or who should not be able to take that life and/or liberty. The requirement that the law would enforce justice for Tracy's "cruel and unusual" murder

was compromised by a consideration of whether a verdict of guilty would constitute "cruel and unusual" punishment for Latimer.[12]

Generally associated with notions of fairness, liberal ideas of equality and the moral ideal of universalism, the law is expected to uphold the rights, freedoms, and protections that are guaranteed to *all* individuals, as dictated by "the supreme law of Canada," and as outlined in the *Canadian Charter of Rights and Freedoms.*[13] Section 15 of the Charter is particularly significant for people with disabilities in that it specifically mentions "mental or physical disability" in its mandate, claiming "*every* individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination."[14] Additionally, section 7 is central to this father-daughter murder case because it insists that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof." As a "supreme" protector of the human rights ensconced in the Charter, then, the law, it would seem, had a

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[12] This allusion is to section 12 of the Charter: Everyone has the right not to be subjected to any cruel and unusual treatment or punishment (Charter). Latimer's attorney, Mark Brayford, used this section to claim that the ten year minimum sentence for second-degree murder would constitute "cruel and unusual punishment" for Latimer, who had acted as any compassionate, caring father would in mercifully ending his daughter's pain and suffering.

[13] Traditionally, the law defines the relationship between the rational individual, or the 'natural' person who has the capacity for rights and duties, and the state. In *The Canadian Law Dictionary*, John Yogis defines "Disability" as the "absence of legal capacity to do certain acts or enjoy certain benefits, . . . the want of physical or mental ability" resulting in "a want of legal capacity" which "renders a person legally incompetent" (80-81). Under the terms of the Charter, which purports to protect the rights of *all* individuals, this distinction is no longer relevant. I would argue, however, that the Latimer case is evidence that this discriminatory distinction, which creates an inequality between Canadian citizens, is still in operational use. It indicates that both parliament and the law needs to rethink equality, as it is conceived in the Charter and in the Courts, in terms of the way in which it functions, not as "the condition of each man's peculiarity" but, rather, "the extinction of individuality", not as difference, but as "in-difference" (Frank 398).

[14] This focus on equality is in keeping with the initial framing of the Charter in 1982, when one of the central objectives was to "strengthen national unity by focusing Canadians of all backgrounds on the political values they hold in common" (Cric papers # 5 32). Protecting official languages, multiculturalism, and equality rights, the Charter was to become a "symbol of national identity", promoting and defining "the very ideal of Canada: a pluralist, inclusive and tolerant country, one in which all citizens can feel equally at home" (32).

responsibility to enforce justice and defend the human rights of Tracy, which were clearly violated when her father premeditated and committed her murder.

However, an examination of the 1994 Latimer trial reveals that there is a significant gap between the rule of law, as established in the Charter and its indeterminate interpretation in the courtroom. In this case, justice hinged not on universal concepts of "equality" that purport to value *all* lives, but on a narrow interpretation of equality firmly couched in normative notions of what constitutes human personhood.

Going out of his way to portray Latimer as a "wonderful loving father," who always had "the best interests at heart for Tracy" (346), Brayford argues for Latimer's authority in that he was a responsible parent who "did what he felt was right, did what he felt was necessary" (363), and who "was entitled to make that decision for her" (372). Using what became known as Latimer's "novel" defence, Brayford stated that Latimer "had an obligation, a legal obligation as her [guardian]. . . the absolute legal right, to commit suicide [for her] if [he wants]" (372). In short, Brayford argued that Latimer was "justified in inflicting the harm that he did to avoid the torment" (371). In this context, the referent for "torment" remains ambiguous; indirectly, this implies that it is not only Tracy's torment that Latimer was trying to avoid, but, ironically, also his own. Consequently, the case rested not on murder but on mercy, not on Latimer's cold decision to kill his daughter but on Tracy's pain and her "complete lack of physical and intellectual abilities" (*Her Majesty the Queen and Robert W. Latimer* 1995), not on equality but on inequality.

Practically speaking, as Peter Carver points out, the attempt to insure protection and equality for "*every* individual" under the law is impossible (15): "all laws are by

nature unequal, or discriminatory, in that they draw lines between classes of persons" (15). To maintain order, the law has to choose between competing individuals and between competing truths and facts. In terms of the Latimer case, as soon as Tracy's pain and suffering are introduced and compared to Latimer's rights as an overburdened and caring father, what should have been a straightforward murder case becomes a Charter debate on the hierarchical value of different "types" of persons in terms of who or who is not deserving of life and liberty, and who or who should not be able to take that life and liberty. In this type of situation, as Jerome Frank points out, all too often the law is less about truths, rules, and facts, than it is about half-truths, opinions and the "colouring of facts" or fictions (19).[15]

The fictive nature of this legally-endorsed reality is encompassed in Teubner's belief that all social reality is constructed.[16] For Teubner, there is no truth, only different versions of the truth, which are promoted by individuals and institutions motivated by the desire to accept "one version of reality rather than another" (King and Piper 19).[17] Although Robert Latimer's 1994 criminal trial and his charge of first-degree murder

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[15] This subjective reading of facts is highlighted in the 1994 trial, when Justice C. R. Wimmer informs the jury of their responsibility to do justice to this case: "I suggest that you watch the witnesses carefully and form your own individual impressions of their testimony. Some will impress you as being fair and impartial and credible. Others may have an interest in the outcome of the case and that may affect your judgment as to whether you can accept all or part or none of the testimony. . . . It is often helpful to observe the demeanour of a witness as he or she is testifying because sometimes that gives clues as to the accuracy of what is being said" (27).

[16] The ability of constitutional and trial law to create and utilize fictions and myths is not a new idea. Since the early 1980s, Critical Legal Studies has pointed out how the court uses stories "to evoke familiar, conventional realities, if only to highlight offending deviations from them" (Bruner 12). Positions on the use of stories in the courtroom vary: while Sherene Razack is concerned with the way in which law's official story excludes the stories of outsiders leads her to argue for the recuperation of stories as a "tool for social change" (Razack 37), Richard Delgado writes about how legal stories exist to remind the "dominant group" of "its identity in relation to outgroups," providing the dominant group "with "a form of shared reality in which its own superior position is seen as natural" (Delgado 2412).

[17] In this respect, Teubner argues that each discourse and institution has its own criteria and its own approved procedures for establishing and promoting the 'truth'. As the dominant institution, it is the law's job to unite and mediate a communal trust in shared normative truths. Consequently, the law "arbitrate[s] between different reality constructions," reconstructing problems in ways that advance its social function as an upholder of the moral and political order (27).

resulted in his conviction of second-degree murder—largely because Latimer's confession convicted him far beyond any reasonable or excusable doubt—the case is illuminating in that it reveals not only that the law "privilege[s] one story over another" (Razack 41), but how and why in contemporary Canada, and with specific reference to people with disabilities, this privileging or fictionalising occurs.[18]

It might be useful at this point to think of this case less in terms of the Charter's ability to dictate how the law universally and fairly administers justice, and more in terms of the law's ability to dictate and manipulate the clauses of the Charter so that it reflects, values, and privileges particular persons and perspectives. I am not talking here simply about a factual and abstract legal debate on the precedents set by the other cases in relation to this particular Charter clause and this particular case, but, rather, about the tendency of legal debate to sway knowledge and fact with subjective representations and constructed fictions that interpret clauses such as section 15 so that terms like "equality" become loaded with normative assumptions and expectations for seeing, judging, and acting in the courts, and in the world.

For example, in his "submissions of counsel," Kirkham, the Crown counsel, attempts to expose as fallacious Latimer's claim that he was "acting out of love for his

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[18] Responding to this hegemonic construction of Tracy, disability organizations attempted to provide the public with a another story that affirmed the lives of people with disabilities. However, their involvement with this case was not immediate. In part, as Ruth Enns argues, this was because disability organizations, and the Council of Canadians with Disabilities (CCD), in particular, were still responding to the Sue Rodriguez' request for a physician-assisted suicide (20). Because these groups had intervened in Rodriguez' favour, supporting the equal rights of people with disabilities to be able to commit suicide if they so chose, they had to first clarify where they stood on this related issue of euthanasia. Eventually, either a conviction concerning the sanctity-of-life ethics (PEP's dominant position) or an awareness of "the potentially deadly consequences of mixing misperceptions with assisted suicide" (CCD's dominant position) persuaded these disability right's groups to "concede the inadequacy of any conceivable safeguards" that they had been considering for assisted-suicide in relation to the Rodriguez case, and reverse its stand on assisted suicide (21). In February, 1995 CCD, the Saskatchewan Voice and PEP were granted intervenor status in Latimer's appeal of his murder conviction. A full analysis of the disability right's perspective can be found in Ruth Enns', *A Voice Unheard: The Latimer Case and People with Disabilities.*

daughter" when he decided to "put her out of her pain" (*Her Majesty the Queen and Robert W. Latimer* 1994 355). Highlighting not only Latimer's apparent lack of remorse or guilt, but also his apparent lack of grief, Kirkham points the jury to Latimer's cool, rational explanation to the police of how he had deliberated first about giving "her some valium" and then, second, "about shooting her in the head" (293). According to Kirkham, this is paralleled by Latimer's "cold, calculated, businesslike decision" to "seat himself in the box of the truck and time his daughter's murder" (357), and by his repeated insistence that "I don't believe I ever committed any crime here" (353).

This argument was overshadowed by Brayford's insistence that Tracy's life was not worth living, at least in part because Brayford had consistently reinforced throughout the trial the frame for thinking about Tracy, first established by Latimer and the police officers in the confession. Given Tracy's pain, Brayford argued, Latimer was "overwhelmingly compelled to do what he did, that *normal* human instincts actuated him to do what he thought was the only *reasonable* course (371, my italics). While Kirkham's and Brayford's conflicting opinions reveal how knowledge and facts in the courtroom are both subjective and constructed, exposing Latimer both as a man capable of making calculating, utilitarian choices about the life of his disabled child, and as a man, a father, who does what is right and moral, taking the life of his disabled daughter, for her own sake, they also demonstrate how the constitutional notion of "equality" has no fixed or guaranteed meaning. Its meaning, rather, depends upon the ability of lawyers to construct "a structurally complete story . . . an internally consistent interpretation" for or against the defendant's behaviour (Bennett and Feldman 94).[19]

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[19] Compromising the idea that agonistic debate negotiates alternative truths, this argument points to the idea that no truth can ever be reached, since all truth is constructed and contained within a framework of fiction.

Jerome Frank's "fight theory" of law is a useful paradigm for understanding the "contentious or adversary" nature of trials (80). In this scenario, "two men argue, as unfairly as possible, on opposite sides" in an attempt to uncover the 'truth' (Macaulay qtd in Frank 80). As Frank states, however, the danger with this widely-accepted and practiced model is that an objective, rational and intelligent inquiry can deteriorate into a situation where the "partisanship of the opposing lawyers blocks the uncovering of vital evidence or leads to a presentation of vital testimony in a way that distorts it" (81). According to Frank, this distortion of the truth is a common occurrence: "one party or the other is always supremely interested in misrepresenting, exaggerating, or suppressing the truth" (87). This has serious consequences for individuals who are brought to court, as well as for the credibility of the legal process.

Because Latimer gave a full confession, outlining in detail not only how he murdered his daughter, but also how he had planned it, Randy Kirkham made the assumption that his charge of first-degree murder would lead to a "reasonable likelihood of conviction." Consequently, his attempt to establish the "facts" of the case did not go far enough in proving Latimer's guilt. Not only did he fail to account adequately for the massive amount of public support for Latimer,[20] but he seriously underestimated his opponent, Mark Brayford, Latimer's defence counsel, who, strategically, put Tracy's body on trial in the courtroom and in the media (Saskatchewan Dept. of Justice qtd in Mitchell 500). Asserting that public interest supported his client's (Latimer's) plea of not guilty, Brayford claimed a defence of "necessity," arguing that Latimer had no choice but

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[20] In this respect, CCD documents that in January, 1995 a national petition was submitted to the federal government urging pardon for Latimer. This petition "has 7,000 signatures, and 10,000 petitions are in circulation" ("Latimer Case Chronology" www.pcs.mb.ca/~ccd/ch3.html). The CCD also claimed that by "April 1995, the Latimers [were] receiving 50 to 100 letters a day (all but one out of every 100 offering support). $65,00 in donations for his legal defence fund [had] also been received."

to murder his daughter. This decision enabled Brayford to position his "fight" on another more public and controversial front, utilizing a medical narrative and a largely emotional rhetoric of pain and suffering for his own, or Latimer's ends.

In Brayford's interpretation, this medical knowledge supported the established frame of love and pain, providing evidence for why Tracy's pain was a sufficient reason for her death, even if that death had to be administered by her loving, caring father.[21] In this trial, four medical experts were called upon to testify: Dr. Kislen Bhairo was the coroner at the scene of the crime and Tracy's doctor for the first ten years of her life; Dr. Anne Kathleen Dzus was the paediatric orthopaedic surgeon who operated on Tracy's scoliosis and was due to perform a "resection arthroplasty" on Tracy's hip; Dr. Richard Earl Snyder was the paediatrician called in as an authority on "cerebral palsy victims"; and Dr. Ranjit Waghray was the pathologist who performed the post mortem on Tracy (*Her Majesty the Queen and Robert W. Latimer* 1994 239). The examination and cross-examination of these medical specialists, which affirmed able-bodied expectations and experiences, followed a predictable pattern. This pattern favoured an emotional rather than a rational rhetoric, and promoted a simplified, abstract, and often metaphorical argument in its attempt to negate, as somewhat monstrous or inhuman, Tracy's appearance and experience as a dis-abled pre-adolescent girl.

Because these witnesses were called by Randy Kirkham, the Crown Prosecutor, Mark Brayford, Latimer's defence lawyer, had the advantage of cross-examining them. In this cross-examination, Brayford often simply expanded on Kirkham's initial questioning, appearing, as he did so, to establish the medical 'fact,' which even the

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[21] This speaks to Gunther Teubner's point that in order for the law to maintain its authority, it has to appropriate and incorporate different forms of scientific or social knowledge into "legal models of social reality" (Teubner qtd in King and Piper 28).

prosecution could not refute, that Tracy's life had been a "helpless, hopeless existence" (Enns 17). Additionally, as Ruth Enns points out, "[b]ecause Kirkham did not re-examine any witnesses the defence consistently had the last word" (17). Brayford's cross examination of these specialized medical experts relied on two strategies: he asked definitional questions—questions that often demanded not only a technical explanation, but a descriptive one—concerning the nature of cerebral palsy, and he asked, particularly of Dr. Dzus, questions about the quality of Tracy's pain-filled life, and the "caring, loving environment" that the Latimers provided for her (*Her Majesty the Queen and Robert W. Latimer* 1994 191). These strategies formed part of a larger plan, designed to show Tracy, as Latimer had in his confession, in terms of her dependency, her non-rationality, and her pain.

Distinguishing between Latimer's mental, emotional pain and Tracy's embodied, physical pain, Brayford presents Latimer as a "rational" individual and as a "natural" person, a hard working, supportive, and caring husband and father: "If she threw up, he would—he would clean her up. He would bath her. He changed her diapers, wet or dirty. He just—he was—he was there for her" (*Her Majesty the Queen and Robert W. Latimer* 1994. 331-2). Conversely, Brayford would have the jury believe that Tracy's life was a helpless, hopeless existence that was destined only to progressively get worse. Co-opting the language of medicine, he claimed that the real injustice, in this case, was in keeping Tracy alive. Indeed, if it were not for the "miracles of modern medicine" (365, 367), Tracy's "unnatural" life would have ended when she had been a small baby (368). Within this scenario, Latimer's murder of his daughter is presented by Brayford as being the

"proper choice" (400); indeed, he argues that it is the only rational choice, given Tracy's "irreversible brain damage of great magnitude" (365), and given her pain and suffering.

These assumptions are saturated with cultural norms that indicate a hierarchical and dichotomous privileging. Indeed, if Latimer is identified with the mind and seen as "rational," "natural," or "normal," Tracy is identified with the body and shown to be "non-rational," "unnatural" and "abnormal." Speaking of Tracy's "abnormal" body, he makes it "known" to the jury by encouraging them to visualize its "horrible twisting and wrenching" (371), feel its "excruciating pain" (370), and to fear its "dislocated" and potentially "comatose" state (367). This description is reinforced by Laura Latimer's subjective description of Tracy's cerebral palsy, and by many of the quasi-medical statements made by the medical experts, who describe Tracy in terms of her "twisted" jerking, "forking," stiff, and deformed body (247, 326, 333, 334, 335, 366), and her "abnormal" development (325). According to Diana Majury, this kind of biased and stereotypical discrimination becomes endemic: while this is a definite strategy on Brayford's part, our reading of it is "so engrained, so natural, that we are unable to even contemplate it as discrimination" (46).

In this respect, Kirkham's examination and Brayford's cross-examination of Dr. Kislen Bhairo set the tone for the way in which medical knowledge would be handled in the trial. While Kirkham, after legitimating Bhairo's authority, tried to ascertain the facts of the case, asking Bhairo the details of his initial examination of the recently-dead child, Brayford, in his cross-examination, reverted to the emotionally-based strategy of explaining the "ramifications" of Tracy's "brain damage," and eliciting descriptions of her epileptic seizures, and her "deformed", helpless, and pain-ridden body (*Her Majesty*

the Queen and Robert W. Latimer 79-80).[22] While Brayford appears to be stressing both the ineffectiveness of Tracy's medication and also her complete reliance on it, his insistent questions to the doctor have the effect of creating a visual image of Tracy that is both incomprehensible and tragic.

In this testimony, vivid portrayals of Tracy's "unnatural" stiffening and convulsing body, and of a body so painfully deformed that it cannot even breathe or sit itself upright were enhanced by fragmented and unscientific statements that vaguely, superficially, and sensationally defined the medical details of her 'condition'. For example, Tracy's spasticity was defined in universal terms as her inability to control her movement (80), while her scoliosis was consistently referred to, both by Brayford and the doctor, as Tracy's "deformed trunk" (79). Conceived within a framework that Teubner , in his theory that the law appropriates medical knowledge in an attempt to subject this knowledge to law's power, would argue was designed to simplify the complexity of representations and concepts and reduce medical knowledge to manageable proportions, these descriptions allow the jury to know Tracy synecdochally through her parts—her trunk, her stiff limbs, her "skeletal frame" and her damaged brain—and metaphorically, through her convulsions, her spasticity, her diapers, and her "great deal of pain."

Additionally, Brayford camouflaged his oppressive arguments in a rhetoric of concerned, but shocking descriptions, stories, and drama. At one point, he went as far as to visually enact Tracy's disability for the jury as he encouraged them to imagine what Tracy's scoliosis must have been like: "Regrettably, you heard that eventually just her spine, for example, was twisted at 73 degrees. Ninety degrees is right angles. Try and

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[22] Although Brayford claimed that his description of Tracy's pain was not connected to her disability—which would of course be discriminatory—his frequent descriptions of her body in pain belied this comment.

conceptualise me going up like this and then going out sideways at 90 degrees, thinking about the kinds of pressures and pain that must be going through one's body to be contorted into that kind of situation" (*Her Majesty the Queen and Robert W. Latimer* 1994. 366).

At another point, Brayford shocked the jury into identifying with Tracy's pain and suffering, encouraging them to imagine and feel the pain of her hip surgery: "We have to think about what this surgery entails. They're in effect sawing off the leg but cosmetically leaving it dangling there but they're going to saw off the top of the bone and the ball" (369-370).[23] Within this framework, Tracy disappears as a human being. It more than objectifies Tracy; it dehumanises her. In one respect, she becomes in this rhetoric and language an abstract and pitiful metaphor for pain and suffering; in another respect, she becomes a metaphor for "affliction" (159): an afflicted body that is known through its "spring loaded" limbs, its "abnormal brain" (179), its monstrous and unnatural deformities, and its unbearable pain (368). Her presence signifies dependency, disease and death: the "logical" result of an "affliction" that must be avoided, or at least removed from view, at all costs.

According to Leslie Fiedler, this type of representation reiterates Aristotle's belief that "we respond to the maimed with . . . feelings proper to tragedy, which is to say, with pity and fear" (64). In one respect, this pity and fear may be a reaction to the complete dependency that Tracy represents. In a culture that values extreme forms of independence and individualism, dependency is to be avoided at all costs. Indeed, dependent individuals are seen as antithetical to capitalism's utilitarian and self-sufficient ideology. In a culture that values not compassionate, caring, "sharing citizens," but "self-interested

[23] This rhetoric of mutilation became Brayford's major strategy in the 1997 trial.

consumers" (MacGregor 148), they are considered, as Susanne MacGregor argues, "an unaffordable burden on the economy" (143). Certainly, Tracy is portrayed by Brayford, in conjunction with the medical experts, as being completely use-less and unself-sufficient: "with respect to dealing with just such bodily functions as eating, bowel movements . . . [Tracy] was totally dependent on others (*Her Majesty the Queen and Robert W. Latimer* 1994 79). She had to be spoon fed and she even wore diapers (80). Curiously, at this point, Tracy's dependency can be said to invoke both the responsibility and the pity that enabled her father to kill her out of love. His murder can now be seen as a sacrifice, not of Tracy who was, after all, "better off dead," but of Latimer's liberty. Forgetting Latimer's dishonesty when he tried to conceal his daughter's murder, he now becomes in the eyes of the jury and the judge an honest, upright, loving, responsible, and self-sacrificing man: the adjectives accruing metonymously with each of Brayford's examples.

In another respect, the pity and fear that under-girds the legal and public perception of Tracy may well be an instinctive response, common to modern society, to the "severe" pain that Tracy suffered. In *The Culture of Pain,* David Morris argues that "chronic pain constitutes an immense, invisible crisis at the centre of contemporary life" (5). Pain, perceived as a medical problem, is associated with suffering, helplessness, and grief (10). People pity those who are in pain and fear "the loss of power, loss of reason, loss of freedom" that pain implies (248). Because "our scientific, drug-taking culture" denies, refuses or insists on the elimination of pain, its interpretation (51), "its reassuring explanations and magical cures," is left to medicine (32-33). Medicine, and its role as protector and curer of the public and personal health of the nation, performs the functions

of diagnosing, prescribing, and treating pain. When pain strikes, one can receive a precise diagnosis and receive a powerful prescription drug, which is renewed on a regular basis. However, when medicine's explanations and cures fail, pain is a reminder that all human beings are vulnerable to tragic misfortune: indeed, pain is a reminder that tragic misfortune, as well as the suffering, pain, grief, and loss that accompanies it, is inevitably part of the human condition.

In this trial, Tracy is evidence that pain, in its most extreme, most debilitating, most "severe" form, does exist (*Her Majesty the Queen and Robert Latimer* 1994 248). It is inescapable, since no drugs or operations can completely cure it, and it is unintelligible, since neither medicine nor the law can comfortably explain or interpret it. The failure of medical interpretation is evident in Dr. Richard Snyder's testimony. Although he quotes statistics, he also makes it clear that conditions like cerebral palsy and terms like pain are defined not so much by science, but "by common convention" (242): by "what *normal* people should do" and say (254 emphasis mine). Pointing to the role of medicine—its normative scope and its scientific limitations—Snyder agrees with Brayford when he asks him if the operations that Tracy had were merely a "rear guard action to manage pain" (242). The planned hip operation, he concedes, was designed to "try and stave off progression of [the] symptoms" (262), not make her 'normal' in any way. Encased within a framework of normative, healthy embodiment, Tracy's pain not only becomes more important than Tracy, reducing her to her symptoms, but it becomes more important than the medical establishment's need to cure and / or "normalize" its patients.

If Snyder's response is informative of the limitations of medicine and scientific knowledge, Brayford's rhetoric in this trial is indicative of the way in which the meaning

of pain is always "already constructed" by a normative political agenda, which is, in turn, reinforced by law (48). In the trial, Tracy's pain is envisioned through a medical lens as an embodied, non-normal phenomenon. Emphasizing Tracy's "bleak existence," this view reinforces the argument made by the defence that she was better off dead (247).

In order to support this argument, one of Brayford's key strategies was to recount Tracy's life in terms of the progressive nature of her disability and the subsequent pain she suffered.[24] According to Brayford, it was only the "miracles of modern medicine" that had kept Tracy alive (365). Creating a hopeless picture of Tracy's worsening, degenerative condition, he argues, in circular fashion, that without pain and seizure medication Tracy would die, but with medication, Tracy would be in a "comatose" state (367-368).[25] Consistently conflating Tracy's pain with her disability, the need to "cure" Tracy's disability and control her pain became a central focus in his examination of Dr. Anne Dzus, when Brayford suggested that "pain management" was the main reason for operating on Tracy's hip (183, 189). Even though Dr. Dzuz countered this claim by stating that she was not performing the operation to "try and manage pain medically," but to "keep her sitting as long as possible and to keep her quality of life as best it can be," Brayford cleverly pointed out in a circular argument that the result of not operating would mean increased problems with pain, which would lead to a diminished quality of life (189).

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[24] He denied any attempt to connect her pain to her disability in the 1997 trial, although his argument remained much the same.

[25] In the 1994 trial, Brayford consistently created the impression that cerebral palsy is a degenerative disease. Dr. Snyder's testimony contradicted these assumptions by clearly stating that cerebral palsy is "not a specific disease in itself." Defined by "common convention", it "is a term that encompasses several conditions, an array of conditions that reflect a child who has had damage to the brain, or to the head, hence the word cerebral and the result of that damage is that they have palsy or a paralysis or difficulty with movement or inability to move muscles" (241-242). Moreover, because "conditions in the body change . . . it may look like it's actually deteriorating," but cerebral palsy, in itself, is not progressive.

For Brayford, as for Latimer, neither pain management nor the "medical mutilation" of Tracy were solutions (370). As Brayford stressed, the operation on Tracy's hip would not "cure Tracy's pain for the future . . . there's no cure for cerebral palsy" (189). According to Brayford, the very nature of her disability—her many operations to lengthen her tendons, her scoliosis and her dislocated hip—meant that Tracy was destined to a progressively deteriorating life defined by pain, which medication alone could not "cure" (178, 189).

From Brayford's perspective, then, pain *is* a reason for murder. Its justification hinges on the failure of medicine to provide a cure for the physical, embodied crisis experienced by the twelve-year-old girl. It indicates the limits of medicine and the point at which the law *could* and *does* intervene. Disturbingly, it indicates, more significantly, a legal and paternalistic move to support fathers who might choose, out of love, to kill their disabled children.[26] This progression speaks to David Morris' perception that pain is always shaped and "reshaped by a particular time, place, culture, and individual psyche" (6). It would seem that, in contemporary Canada, physical pain is something to be avoided at all costs.

In this context, Tracy disappears. Her pain seems to be relevant only to the extent that it indicates Latimer's own pain, and only to the extent that it signifies her hopeless and helpless condition. Ultimately, in this context her pain and suffering does become who she is. Unable to imagine or "know" her pain, it becomes impossible to "know" or imagine her as a person. She becomes, in short, a spectacle, a body about which the law

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[26] Speaking of this move to authorize fathers' authority to judge the quality of life of their family members, Kent Roach writes, "such decisions are routinely made by doctors in hospitals, hopefully in consultation with families, but not by fathers on farms" (477).

and the general public can speculate. Her life disappears or is erased by these legal texts that, while pertaining to tell her story, ultimately refuse it.

This negation is supported by Laura Latimer, Tracy's mother, when she confessed to Brayford, "[w]hen I found Tracy [dead] I was happy for her. I was – I was happy because she didn't have to deal with her pain anymore" (*Her Majesty the Queen and Robert Latimer* 1994 346). From this point of view—the point of view shared by the Latimers, by Brayford, and by many of the general public—the perception and interpretation of pain turns common assumptions upside down: where pain is concerned, sometimes death is better than life, murder is a solution to the failure of medicine to provide a cure, and a solution to the life time burden of caring for someone in pain. Certainly, to be in pain or to be close to pain is "to be in a state of crisis" (Morris 30). Pain is not simply a medical issue; in that it signifies disease, dependency, and death, pain has a potentially dire significance for the institutional and personal value and meaning attributed by the law and the general public to certain vulnerable individuals.

Within this legal framework, Tracy becomes a poster child for a pain and suffering that must be eliminated. Because pain becomes the defining frame or story, and because Tracy herself is pathologized, coming to signify death and disease—an "affliction" that must be avoided at all costs—Tracy, as a person, loses her identity. In short, she becomes invisible. She is killed in the rhetoric of the courts as easily as she is killed by her father on his farm.[27]

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[27] Latimer's justification, Tracy's obliteration, a reduction of the case to second-degree murder, an albeit temporary constitutional exemption, and complete vindication in the eyes of the media and many of the general public privilege an able-bodied reality that wants or needs to imagine Latimer as a good father, a loving protector of his children. Because the figure of the father is a "major guarantor of both social and familial order" (Collier 120), there is a failure or a refusal to recognize that the family as an institution, and

Ultimately, it is this emphasis on Tracy's deformed, deviant body, and "bleak existence" (*Her Majesty the Queen and Robert Latimer* 1994 388), that allows Brayford to reinforce the "fact" that Tracy was better off dead. Encouraging the jury to identify with Latimer's pain and with Latimer's love for his daughter, Brayford privileged Latimer's normative story over Tracy's non-normative story. In doing this, he encouraged the jury to consider that Latimer "understood what kind of pain their daughter was in" (370) and, knowing this, he "was faced with no real options" (371). From this perspective, Latimer's choice to murder his daughter was the "responsible" and "right" thing to do (363). Re-conceiving the case not as a murder, but as a mercy killing or as a "compassionate act of kindness" (403), Brayford argues that Latimer had "an obligation, a legal obligation as her [guardian] to look after her and make the right decisions in her life for her," including the "absolute legal right to commit [her] suicide" for her (372). This burdensome choice, as Brayford stresses to the jury, was not only "fair and reasonable," but, ultimately, in a paternalistic sense, "best for society" (376-377).

Brayford's narrative of the murder, created for the benefit of the jury and, ultimately, his client, speaks to a concern that many critical legal theorists have articulated regarding the coercive role of storytelling and myth-making in the courts of law. Expressing her concern with the validity and objectivity of court rhetoric, Kim Lane Scheppele, in her forward to a collection of papers addressing the issue of legal storytelling in the *Michigan Law Review*, stresses that "all courts have is stories. Judges and jurors are not witnesses to the events at issue; they are witnesses to the stories about the events" (2082).

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the father, specifically, could be dangerous, to the point where no child—able bodied or disabled—is safe within "his" hands.

The problem arises when one story is privileged over another, when some stories "are accepted and become 'the facts of the case' and others are rejected and cast aside" (2083). Although Latimer was eventually convicted, the questionable, spurious, and normative assumptions and fictions posed in the courts of law concerning the relationship between Tracy's pain, suffering, disability, and quality of life raises ethical implications not only for how legal storytelling interprets fairly Canadian Charter notions of "equality," "freedom," and "justice," but for how these normative fictions establish and disseminate the "truth" about "what is best for society" (*Her Majesty the Queen and Robert Latimer* 1994. 376-7): a truth, as Tracy's murder can testify, that puts the lives of people with disabilities at risk.

Judge Noble's 1997 Judgment: "No Joy in This for Anyone"[28]

Although Latimer was found guilty in the 1994 trial, the fact that his charge was dropped from first to second-degree murder[29] did not stop his lawyer, Mark Brayford, from appealing the decision. On February 24th, 1995, the appeal, heard in the Saskatchewan Court of Appeal, was denied. Brayford then took the appeal to the Supreme Court of Canada. Once again, he argued that Latimer's confession should not have been admitted as evidence, but he also added a charge against the Crown prosecutor,

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[28] These are Justice Wimmer's words, spoken directly to Robert Latimer at his November, 1994 sentencing. I use them ironically here not to sympathize with Latimer's predicament, but to highlight the consequences of Judge Noble's decision to exempt Latimer from serving the mandatory sentence for second-degree murder.

[29] First-degree murder is more serious than second-degree murder; it involves premeditation and is generally believed to involve a "vengeful, hateful and violent act designed specifically to accomplish the death of the victim" (Noble). In the case of first-degree murder, the "offender is denied parole for 25 years". Second-degree murder is less serious, and, although the "moral blameworthiness of murder can vary from one convicted offender to another," the offender, in this case, is eligible to apply for parole after ten years.

Randy Kirkham, who he claimed was guilty of obstructing justice through jury tampering. As Ruth Enns relates in her analysis of the case,

> According to a *Globe and Mail* report in October 1995, Kirkham had asked RCMP officers to 'find out the beliefs of prospective jurors on such issues as religion, abortion, and mercy killing'. Because several of those subjected to the questioning ended up on the jury, the situation might have left the impression that the jury was not impartial. In February 1997 the court found the confession admissible but ordered a new trial because of the prosecutor's actions. (22-3)

This new trial, which ran from October 27th to November 5th, 1997, charged Latimer with second-degree murder. In this trial, as Enns observes, much of the evidence was "a simple rerun of the last trial," with Brayford focusing on pain—insisting that, "although the pain and the disability both resulted from cerebral palsy, he was not talking about disability" (23)—and the new Crown attorney, Eric Neufield, similar to Kirkham, focusing on Latimer's guilt, rather than the other options that Latimer had at his disposal.[30]

In this second trial, the jury once again found Latimer guilty of second-degree murder. However, in this trial, Justice Ted Noble, calling Latimer's crime an act of

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[30] The issue of pain was addressed in the 1998 intervention factum, put together by the disability rights' groups who had been given intervener status in the 1998 appeal. On the issue of pain, they write: "First, the Coalition submits that the facts do not support the view that Tracy Latimer's life had been one of unremitting pain . . .the extent of Tracy's pain is irrelevant to the outcome of the appeal. Mr. Latimer's actions could not be justified even if Tracy had been in unrelenting pain. The second reason for rejecting the argument that this case is only about 'pain' is because Tracy's pain cannot be seen as something distinct from her disability . . . finally, in any event, it is abundantly clear that Tracy Latimer's disability is the only consideration which even allows Mr. Latimer to suggest that it was somehow justifiable for him to murder his child. Neither the public nor the courts would tolerate his argument for a moment if Tracy had been an able bodied and mentally competent child experiencing severe pain" (CCD Latimer Watch: "Factum Excerpts").

"compassionate homicide," chose not to sentence Latimer to the mandatory ten years in prison (*R. v. Latimer* 1997). Instead, he took the unprecedented step of giving Latimer a constitutional exemption, sentencing him to only two years imprisonment, with one of these years to be served on his farm. Although this decision was overturned in 1998[31] and upheld by the Supreme Court in 2001, Judge Noble's decision is significant because it is revealing of the extent to which the law is "thoroughly imbued with relations of power" (Foucault, *History of Sexuality* 60), positing the "ideality" of a just and good society, at the same time as it constructs, endorses, and reifies an inherently violent, normative, and able-bodied reality.

This section considers the construction of this normative able-bodied reality by examining how its authority rests at least in part on the violent and violating negative legal construction of the experience of disability. In other words, these narratives are not only representative of an abstract way of viewing the world; they have negative consequences in real life, functioning as a form of rhetorical and "visual surveillance" that, in turn, authorizes "other forms of bodily invasion" (Feldman 27). From this perspective, Noble's ruling *goes beyond* a justification of what Latimer "deserves" by forcing a consideration of how legal interpretation perpetuates and legitimates a violent political visualization that has potentially serious consequences for the real, lived experiences of people with disabilities.

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[31] The disability-rights Coalition submitted in their 1998 factum (secion 24) that "It is respectfully submitted that Noble J., diminished Tracy Latimer's life in the eyes of the jury by consistently defining her in terms of her disability. He described her condition as "an incurable affliction" . . . He went on to refer to Mr. Latimer's act of killing his daughter by using the benign term of "putting her to sleep" (CCD Latimer Watch: "Factum Excerpts"). This speaks to the power of judges, and not only lawyers, to create meaning.

Speaking to not only a rhetorical, rational ideology, but also a visual ideology, these legal interpretations enable a collective imagination that views Tracy, and by extension all people with disabilities, as almost already dead. By constructing and fixing Tracy in the perpetual pose of pain and disfigurement, these authoritative and authorial legal interpretations constitute an act of imaginative violence that both precedes and looks forward to the material act of violence that is destined to be repeated. In other words, these legal interpretations preserve a gaze that takes as normal the previous violence towards people with disabilities, while channelling, and possibly materializing this violence in the future. In this way, it is possible to argue that the penetration of Tracy's body and life by the visual and narrative examination in the courts exacerbates the violence that has already been perpetuated against her. Working as a form of surveillance, these interpretations, as the Disability-Rights Coalition so accurately pointed out, "threaten the lives of people with disabilities," warning them that those in authority—parents, judges, social workers—do, and may continue to, wield "unfettered power" at their expense (CCD Latimer Watch: "Factum Excerpts"). [32]

In this respect, Justice Ted Noble's decision legitimates Latimer's "mercy killing" by objectifying and enabling a visualization of Tracy as a disabled "other", as a body that in James I. Porter's words, "appears to lack something essential, something that would make it identifiable and something to identify with"; in this way, Tracy becomes "*too little* a body: a body that is deficiently itself, not quite a body in the full sense of the word, *not real enough*" (xiii). In refusing to acknowledge the complexities of Tracy's lived experience and by speaking of her only in negative terms, Justice Noble not only

[32] A specific analysis of how Tracy and Robert Latimer are constructed in the visual depictions of them in the media is needed to fully explore this line of inquiry.

constructs Tracy as an absent presence that is not quite "real enough" to be considered a human being, with all the rights that this implies, but establishes a way of thinking about dis-abled "others" that imagines them through the inevitability of and even the need for their "compassionate deaths" (*R. v. Latimer* 1997 Decision).[33]

Bound by the rules and regulations of legal discourse, Noble's judgement, on an initial reading, appears to offer a thoughtful, rational interpretation of the Latimer case. Conforming to the requirements for the written justification of legal rulings, Noble demonstrates his understanding in relation to constitutional and criminal law, and in relation to other cases that set precedents for understanding the Latimer case. Latimer's lawyer's use of section 12 of the *Canadian Charter of Rights and Freedoms*— "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment"—to argue that the mandatory minimum for second-degree murder was, in Latimer's case, "harsh and more than excessive" forces Noble to consider this claim in relation to other section 12 challenges. Referencing "Laskin C.J.C. in Miller," Noble states that he agrees with Laskin when he argues that "the phrase cruel and unusual [is] a 'compendious expression of a norm'" and, as such, demands that the "punishment prescribed" be considered in terms of the extent to which it " 'is so excessive as to outrage standards of decency'." While the relationship between decency and the norm is not elucidated, it is possible to assume from Noble's reading of the meaning behind section 12, that, although the state may impose punishment, "the effect of that punishment must not be grossly

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[33] Responding to Noble's construction of Tracy, the Disability-Rights Coalition writes that "this Court should not see Tracy Latimer only in terms of her disabilities. Her status as a human being must be paramount. Her disability cannot be used as a justification from departing from fundamental constitutional values. She was a person first and that fact must not be obscured by the detail of her medical problems" (CCD Latimer Watch: "Factum Excerpts).

disproportionate to what would have been appropriate," as that appropriateness is read within a decent, normative framework of understanding.

It is, as the Disability-Rights Coalition argue in their factum for the 1998 appeal, this normative able-bodied framework of understanding that allows Latimer to twist the normative requirement that he is, as a parent, responsible for Tracy's care into an insistence that it was "somehow justifiable for him to murder his child (CCD Latimer Watch: "Factum Excerpts"). Subverting the notion that the murder was a "cruel and unusual punishment" for Tracy, whose only crime was that she was alive, this twist in logic makes the argument that punishing Latimer for the premeditated killing of his daughter is somehow "so cruel and unusual" for him, in that it "offend[s] his Charter rights." While, as the Coalition points out, it might seem logical to argue that "there is no room in Canadian law " for either a "system where sentencing is put on a sliding scale depending on the characteristics of the victim" or for "a doctrine that would literally fix disabled people with an ongoing burden to 'justify their existence'," Judge Noble in his decision would apparently disagree.

In judging this case, Noble relies on normative liberal expectations and assumptions that position people with disabilities as inferior, these assumptions operating recursively to assign meaning according to "decent" societal norms (Teubner 4). These norms are at work when, referencing Justice Cory's argument in *Steel v. Mountain Institution*, Noble argues, "[i]t will only be on rare and unique occasions that a court will find a sentence so grossly disproportionate that it violates the provisions of s. 12 of the Charter." Reading Latimer's second-degree murder charge, with its mandatory ten-year sentence, as one of these rare and unique occasions, Noble supports the reading that this

sentence constitutes a cruel and unusual punishment for Latimer. In refusing to take into account how this interpretation positions Tracy's murder as being not a cruel or unusual treatment deserving of justice, Noble trivializes the Charter, and the legal demand that "[t]he test for determining whether a sentence is disproportionately long is very properly stringent and demanding." Constituting not a stringent test, but a lesser test, Noble's reading of section 12 tends to trivialize not only the Charter, but also, I would add, the equal rights of the disabled, whose lives may well, in this case, depend on a fair and just decision.

While Noble's "stringent and demanding" argument clearly supports the belief put forward by Latimer's defence that the "punishment prescribed" to Latimer "is so excessive as to outrage the [normative] standards of decency," it also goes one step further by suggesting that the legal system should support what, "for want of a better term," Noble calls "compassionate homicide." In this way, Noble belies his own claim that he cannot "consider general deterrence or other penological purposes that *go beyond* the particular offender in determining a sentence" (my italics). Going beyond a consideration of Latimer and his offence, Noble stresses that if he does *not* grant Latimer a constitutional exemption, "it is unlikely that any set of facts will ever arise where this rarely granted legal remedy can be made available to one who commits an act of compassionate homicide."[34]

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[34] In the 1998 appeal, the Coalition stressed "the importance of the deterrent function of the law," which "cannot be overemphasized" (CCD Latimer Watch: "Exemption Quashed"). To support this point, Grant Mitchell's speech made at the vigils for Tracy Latimer was quoted: "As a parent of a disabled teenager, I need to know that my daughter, already made vulnerable by nature, will not be made even more vulnerable by our laws. The *Charter* says we all have equal protection of the law, how else to measure that 'equal protection' than by the criminal liability of those who commit the crimes—the offense they are found guilty of and the sentence they receive. That is what deters."

The potential of this decision to endorse a "legal remedy" for the offender who has committed or who desires to commit an act of "compassionate homicide," points to the ability of law and legal interpretations to, as Judith Butler argues, "[echo] forth" or reinvoke new laws or new policies that, while embodying the legal authority to discursively make and remake bodies and subjectivities, always ultimately restructures reality in its own normative image (*Bodies that Matter* 107). In other words, law affirms and perpetuates the status quo, legitimating certain experiences and certain subjectivities over others by "officially approving and accepting, and transforming into fact" the experiences of the normative majority, while "officially distrust[ing], reject[ing], [and finding] to be untrue" the experiences of non-normative minorities (Teubner 279).

While this legitimation of the norm makes clear, in Butler's terms, that "what is *invoked* by the one who speaks or inscribes the law is *the fiction* of a speaker who wields the authority to make his words binding, the legal incarnation of the divine utterance" (Butler *Bodies that Matter* 107), it also suggests law's ability to constitutively endorse and legitimate "organized, social practices of violence," both a "violence which has already occurred" (as in Latimer's case) and a violence which "is about to occur," or be repeated. Evidence of this repetition can be seen in the increasing support for and the growing occurrence of assisted-suicide or mercy killings in Canada (Cover 203).[35]

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[35] In this respect, Dick Sobsey points out that "in the years ensuing since Tracy's murder, the community of persons with disabilities has witnessed more killings: Ryan Wilkieson, Katie Lynn Baker, Charles Blais, Andrea Halpin. The murder of Tracy Latimer was not an isolated incident" (CCD Latimer Watch: "Exemption Quashed"). Interestingly, in his judgement, Noble himself cites lists a few such cases. Although these cases do not relate directly to the Latimer case, in that his examples document the assisted-suicides of aged or terminally-ill people, he uses them as evidence that Latimer, similar to the perpetrators of the other cases, deserves a minimal sentence. On another note, this increasing support for assisted-suicide or mercy killings is also seen in the United States, as can be seen at the present time in relation to the Terry Schiavo case. The public support for her husband's desire to let her die by starvation and dehydration can be paralleled to the public support for Latimer in Canada.

What interests me here is how this violent repetition, contained within the legal narratives, the visual representations, the judgments and public interpretations of this case, creates the circumstances for what Allen Feldman calls "the circumscribed and enforced space of the politically real" (37). The ideological rationality that informs Judge Noble's support for Latimer and the practice of compassionate homicide not only lends these acts credence, but attempts to enforce an acceptance of them in real-life practices. An examination of how Noble imposes this meaning, and how this meaning functions ideologically to establish ways of seeing and knowing that perpetuate violent acts against those who, like Tracy Latimer, are "*repeatedly* assumed, whereby 'assumption' is not a singular act or event, but, rather, an iterable practice," to be "better off dead" is informative of a political agenda that devalues people with disabilities (Butler, *Bodies that Matter* 108).

In practical terms, because Noble's desire for a "stringent and demanding" examination of this case constitutes in large part a recourse, or a number of recourses, to a legislative norm, he reiterates previous citations made by Gonthier J. in *R. v. Goltz* and by Lamer J. in *R. v. Smith*. These citations demand that, in section 12 challenges, the "court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case." This context will supposedly allow Noble to judge whether the mandatory ten-year sentence "prescribed by law" is, in Latimer's case, "grossly disproportionate."

In considering these facts, Noble pits the rights of Robert Latimer against the rights of his daughter, Tracy. Refusing Kirkham's depiction in the first trial of Latimer "as a cold-blooded killer . . . [a] foul, callous, cold, calculating" man, who is "not

motivated by anything other than making his own life easier," Noble promotes instead the image of Latimer as a model citizen: a "responsible and hard working farmer . . . a devoted family man with a loving and caring nature . . . a caring and responsible person, . . . and a loving and protective parent."

In keeping with this character reading, Noble rejects the accusation made in the first trial that Latimer killed Tracy because she was disabled. Stressing that Latimer was a "loving, protective parent, "devoted to this child" and her care, Noble argues repeatedly that all the evidence indicated that Latimer's concern was not for Tracy's disability, but for her pain. In a paragraph that begins with the question, "[w]hy did he do it?," Noble stresses that Latimer's "only concern was Tracy's ongoing pain."

Noble, however, in a similar way to Mark Brayford, Latimer's lawyer, is unable ultimately to separate Tracy's pain from her disability. In arguing that Latimer was motivated by "his concern for her pain which he saw flowing from her illness," he conflates, unintentionally, illness and disability, suggesting that they contributed not only to her pain, but to her "slowly but steadily deteriorating health." In doing this, Noble, echoing Brayford, reiterates only a superficial pseudo-medical expertise that ignores the fact that cerebral palsy is not an illness, but a non-progressive condition affecting body movement and muscle coordination. The claim that Latimer killed his daughter solely on account of her "unremitting" pain can be read more accurately as an attempt to first provide a loving context for Tracy's murder, thereby making it acceptable, and second, as a political attempt to avoid accusations of discriminative violence against people with disabilities. In this respect, Latimer's claim that he felt "he must do his *duty* as her father to relieve her of [the] prospect" of her "present and future pain" can only be read in terms

of an attempt to use his relationship with Tracy to make his underlying discrimination against the disabled palatable and, of course, political.

While Latimer is not portrayed as being in need of any rehabilitation for doing what he perceived to be his "duty" as a father, Tracy is figured here as being beyond rehabilitation, and beyond any meaningful identification outside of her physical disability and outside of her pain and inescapable suffering.[36] The cumulative effect of this debilitating discourse results in a construction that imagines Tracy as a metaphor for suffering and pain. Known through her "present and future pain" and through the unimaginable "extent of . . . [her] suffering," Latimer's decision to "alleviate her suffering" by "[taking] the matter of Tracy's pain into his own hands" in order to "[put] her out of her misery" becomes understandable precisely because she ceases to be a person in the full sense of the term, lacking "something essential, something that would make [her] identifiable," in the "normal" sense of the word.

This metaphorical construction of Tracy imposes a reality that refuses any other way of knowing her. The repetitious, consistent representation of her as non-human, in all her many dis-abled forms, speaks to a political agenda that utilizes the language of metaphor to create a visual "realist mode of depiction and perception" (Feldman 43). This depiction clarifies and reifies Tracy's place in "a hierarchy of credibility and fact setting," while also, concomitantly, establishing as an acceptable methodology, "a public form of truth claiming and depictive legitimation" (43). Reading and visualizing her as a helpless baby, an animal, or as a "pain-filled bundle of needs" refuses to acknowledge either her mother's claim that she was a "very happy, very happy little girl" (*Her Majesty the*

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[36] Again, a parallel can be made to the Terry Schiavo case. It is only when it is clear that any attempts at rehabilitation are not going to restore Schiavo to her former "normal" self, that her husband gives up, and starts lobbying for her death.

Queen and Robert Latimer 1994 331) or the entries in Tracy's school communication book that documented her "good times"—"eating, sleeping, participating in school and family activities, playing, making choices and being a little mischievous" (Enns 34)—and enacts a rhetorical and visual violence that is a prelude to accepting the inevitability of her actual physical death. This violence is imagined not only metaphorically by reducing Tracy to her pain and suffering, but also discursively through her construction as an object of pseudo-scientific inquiry. In this construction, she becomes known through a rhetoric of mutilation that paradoxically deconstructs her in an attempt to recreate her as an always-already dismembered body: as "some-thing" not even her father could put back together again.

In order to stress the "enormity of [Latimer's] task" in caring for Tracy, Noble summarizes the surgical operations that Tracy undergoes throughout her life, documenting how, at the age of four, an operation "to cut her muscles and tendons" meant that she was "left with a flail limb," how at nine years she was "placed in a cast from chest to toes," and how by 1992, "her body had become so twisted out of shape that the surgeon placed steel rods in her back to straighten her body." Known through her "radical [surgeries]"—her cuts, body casts, rods, and resulting debilitating pain—and known synechdochally through her flail limbs, her dysfunctional hips, back, head, arms, muscles, joints, and tendons, Tracy is visually and imaginatively taken apart. In this rhetoric she is, as in "real" life, "so twisted out of shape" that the reader is lead to believe that her condition is not only deteriorating, but that she constitutes a body that is, in James I. Porter's terms, only "deficiently itself" (xiii). In this way, it can be argued, that Tracy was living a torturous life, a living death.

Noble's rhetoric supports Latimer's attempt to put Tracy "out of her misery," justifying her "actual" death, while providing a context for thinking about other offenders of what Noble calls, "euthanasia-type mercy killings" of the "severely disabled" (*R. v. Latimer* 1997 Decision). Because Noble suggests that those who commit "the grave act [of] murder," killing out of "self interest, malevolence, hate or violence" and those who kill for "caring and altruistic reasons," assuming the role of "surrogate decision maker[s]," represent widely different levels of culpability, he is able to argue, by analogous extension, that they warrant the creation of a new category of criminal law: one that falls under the rubric of "compassionate homicide."

According to Judge Noble, this lenient move to excuse the perpetrators of "mercy killings" is supported by public opinion. Claiming that the first trial's imposition of the mandatory minimum ten-year sentence for second-degree murder provoked "an unprecedented public reaction against the severity of the punishment," Noble argues that "there is considerable evidence that this case and the life sentence without parole for ten years imposed (or to be imposed) on Mr. Latimer is seen by the public who responded in this manner as an outrage." He cites here, as evidence to support his claim, "hundreds of letters from all over Canada" that "protested the harshness of the mandatory sentence". Some of these letters, he writes, "came from people who were themselves handicapped. Some came from church groups." These protesters, according to Noble, were incensed by the "injustice of [Latimer's] conviction, but more particularly [by] the harshness of the sentence required by law."

Here, Noble is guilty of making the logical fallacy of "converse accident:" assuming that what is true for a particular group of people who support Latimer, is true

for *all* Canadians (Copi and Cohen 100). From a perspective that values the lives of people with disabilities—perspectives put forward by numerous Canadians and by the Disability-Rights Interveners in the Latimer case—leniency for Latimer constitutes a dangerous injustice in that it sets a precedent for how people with disabilities will be viewed and treated under the law. Additionally, a ruling that advocates leniency for Latimer constitutes a violation of the *Canadian Charter of Rights and Freedoms*. Using section 12 of the Charter to favour Latimer by circumventing Canadian criminal and minimum sentencing laws overrides section 15, which guarantees disabled people equal protection under the law.[37]

In this respect it is possible to understand Noble's attempt to create a new category of homicide through the manipulation of Charter mandates and through the elicitation of public support not only as examples of fallacious interpretation and reasoning, but also as an example of what Copi and Cohen call a "convenient deception" (101). This largely unconscious deception envisions, calls into being and legitimates what Robert M. Cover calls a "nomos" or a "normative universe" (5). While law's creation of this normative universe is premised on a desire to build a "better world," it does so, in Cover's terms, by establishing binary relationships that work to "create and maintain a world of right and wrong, lawful and unlawful, of valid and void" (5). In doing this, law is inattentive to the way in which these binaries, which are always read in hierarchical relation to one another (love and pain, for instance), promote a violence that negates the life of the "other." If, for example, Latimer's mercy killing is seen as being right, Tracy's

[37] Section 15 of the Charter reads, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

life must be wrong, if Latimer's actions are considered lawful, then Tracy's life must be considered unlawful, if Latimer's life and his able-bodied perspective is valid, then Tracy's life and the perspective of people with disabilities, precisely to the extent that they disturb the norm, must, according to Cover's logic, be voided.

Because Noble's decision establishes an essential binary between the able-bodied and the disabled, his attempt to create a just interpretation of the Latimer case can be read, through an examination of his omissions and assumptions, as indicative of the way in which law, through its use of language and representational practices, and through its tendency to silence perspectives and deny individual experience, perpetuates and prescribes a cultural violence (Sarat 4). Because this violence is always already contained within the normative structures and schemas that mask violence with moral and ethical imperatives or justifications, it is difficult to see clearly the power that this violence presupposes. From this perspective, the disabled body "provide[s] the necessary "outside," if not the necessary support, for the bodies which, in materializing the norm, qualify as bodies that matter" (Butler, *Bodies That Matter* 16). More specifically, an analysis of this legal materialization of the norm forces a consideration of Tracy's body as a body that does indeed "matter".

The 2001 Supreme Court Decision: A "Just" Solution?

In many respect, this affirmation is supported by the 1998 appeal, which "dismissed [Latimer's] application for a constitutional exemption and affirm[ed] the sentence imposed by the learned trial judge" (*R. v. Latimer* 1998 Appeal), and by the 2001 Supreme Court Decision, which concluded that "the minimum mandatory sentence

[for second-degree murder] is not grossly disproportionate in this case" and "there is no basis for granting [Latimer] a constitutional exemption."[38] In that this final Supreme Court decision acknowledges as paramount the need to protect vulnerable individuals, it can be said to speak to a sense of closure on this debate. The Charter has been put to right, affirming its mandate to protect the rights of all individuals, and authority has been re-established, not in favour of the individual and his or her right to choose, but in favour of the state, and the dominant institution of the law that denounces the murder of vulnerable individuals.

Promising, in this respect, is the Court's statement that:

> The objective of denunciation mandates that a sentence should communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. (*R. v. Latimer SCC* 2001)

While this statement can be seen to contradict public sentiment and the minority decisions in each trial and each decision that consistently stress that there has been a fundamental change in values in respect to the role that these life-and-death issues play in contemporary society, it does reassure the vulnerable that they are, for the time being, safe.

In this respect, the Council of Canadians with Disabilities (CCD), noted that the Supreme Court decision was positive in that it portrayed Robert Latimer and Tracy

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[38] The Supreme Court reached its decision on January 18th, 2001. The Justices McLachlin, C.J.C, L'Hereux-Dube, Gonthier, Iacobucci, Major, Binnie and Arbour, J.J were present.

Latimer "in a balanced manner," and in that it recognized and validated the very real dangers of the slippery slope.

In the 18th January, 2001 CCD Latimer Watch article, "Supreme Court Decides Against Robert Latimer," CCD representatives stated that the Supreme Court justices viewed Tracy from a neutral perspective, stating matter-of-factly that she "was quadriplegic and her physical condition rendered her immobile." It also noted some positive aspects about her life, such as her like of "music, bonfires, being with her family and the circus." Similarly, an examination of the Supreme Court decision reveals that the Justices refused to be swayed by the fictions perpetuated in the courtroom, arguing, in respect to Latimer, that "we must give due consideration to Mr. Latimer's initial attempts to conceal his actions, his lack of remorse, his position of trust, the significant degree of planning and premeditation, and Tracy's extreme vulnerability." While this statement was qualified by an acknowledgment of Mr. Latimer's good character and standing in the community, his tortured anxiety about Tracy's well-being, and his laudable perseverance as a caring and involved parent," it did not outweigh "the serious gravity of [the] case" and the judgment that Latimer's actions still represented "the most serious crime in our criminal law."

In recognizing the seriousness of this crime, the Supreme Court acknowledges also the dangers of the slippery slope. Pointing to the possibility that this murder may generate other similar murders, the court, in presenting the decision, stated:

> Denunciation becomes much more important in the consideration of sentencing in cases where there is a 'high degree of planning and premeditation, and where the offence and its consequences are highly publicised, [so that] like-minded

> individuals may well be deterred by severe sentences'. . . . This is particularly so where the victim is a vulnerable person with respect to age, disability, or other similar factors.

This acknowledgment of the slippery slope was also present in their discussion of the Defence of Necessity.[39] In this respect, Justice J. Dickson "insisted that the defence of necessity"—the defence that Latimer had no other option but to kill Tracy—should not be allowed. As he argued, "were the criteria for the defence loosened or approached purely subjectively, . . . necessity would 'very easily become simply a mask for anarchy'."

While this interpretation is positive for the future of people with disabilities, the disability rights' movement is concerned that the gesture at the end of the decision, to refer to "the royal prerogative of mercy that is found in s. 749 of the *Criminal Code,* which provides '[n]othing in this Act in any manner limits or affects Her Majesty's royal prerogative of mercy." In this respect, they quote Sopinka's comments in *R. v. Sarson,* that

> [w]here the courts are unable to provide an appropriate remedy in cases that the executive sees as unjust imprisonment, the executive is permitted to dispense 'mercy', and order the release of the offender. The royal prerogative of mercy is the only potential remedy for persons who have exhausted their rights of appeal and are unable to show that their sentence fails to accord

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[39] The Defence of Necessity, used in Latimer's novel argument, states that the harm avoided (by the criminal act) must clearly outweigh the harm inflicted: "The two harms must, at a minimum be of comparable gravity. That is, the harm avoided must be either comparable to, or clearly greater than, the harm inflicted." In this case, the Justices of the court agreed that the harm avoided (Tracy's pain) did not outweigh the harm inflicted (Tracy's death). As the court pointed out, "Killing a person—in order to relieve the suffering produced by a medically manageable physical or mental condition—is not a proportionate response to the harm represented by the non-life-threatening suffering resulting from that condition."

with the *Charter*.

In this respect, then, the Supreme Court Decision can be read not so much as an affirmation of disabled subjectivity, but of a conservative acknowledgment that it is not for the courts to decide issues of public policy. By insisting that this decision is a matter not for the courts, but for the executive, the Supreme Court effectively negates its affirmation of disability, contextualizing its decision in procedural law and the status quo, while, at the same time, deferring judgment to Parliament. Additionally, qualifying the notion that this decision is supported by Canadians, the Council for Canadians with Disabilities noted in an article entitled, "Responding to Concerns" on February 2nd, 2001, that "some Canadians have been calling for the Government of Canada to grant Robert Latimer a Royal Prerogative of Mercy." Supported by "Mr. Greenspan, one of Latimer's defence lawyers," and by a number of Canadians who "have been signing petitions . . . [and] going to rallies," this call to mercy for Latimer is an indication that this "hot potato" issue is far from resolved. Read in context of the ongoing debate about these issues, including the recent Evelyn Martens' case,[40] Marcel Tremblay's assisted suicide,[41] and Francine Lalonde's introduction of Bill C-407,[42] it may even be an indication that

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[40] In 2004, Evelyn Martens was charged with assisting the suicides of two women from British Columbia: Monique Charest and Leyanne Burchell. Martens was charged but found not guilty.

[41] Marcel Tremblay, from Kanata, Ontario, received assistance to commit suicide in January, 2005. He was suffering from pulmonary fibrosis, an incurable lung disease that makes it difficult to breathe. Tremblay went public about his intentions to receive assistance to commit suicide—by placing a helium-filled bag over his head—in the hopes of sparking a nationwide debate on the right-to-die issue, and ending "decades of physical suffering" for those in pain (CBC News. Jan. 29th, 2005. www.cbc.ca)

[42] On June 15, 2005, Francine Lalonde, a lawmaker from La Pointe-de-l'Ile, introduced Bill C-407. The measure would permit a medical practitioner or someone assisted by a medical practitioner to aid another person to die if that person has a terminal illness or is experiencing severe physical or mental pain and "appears to be lucid" when he/she requests death. The bill, which proposes an amendment of Section 222 (the clause forbidding homicide and euthanasia) and Section 241 (the clause forbidding assisted suicide), had its first reading in June 2005. The second reading was tabled because of the Federal election, but there is a fear that the new government will revisit the bill. Indeed, Bloc MP Francine Lalonde has expressed her intentions of reintroducing the bill as soon as possible. However, because private member bills are introduced by way of a lottery system—the members who wish to introduce bills being randomly assigned

Canadians are already sliding towards a legal, moral, and social acceptance of euthanasia and assisted-suicide.

While this irresolution speaks to Chantal Mouffe's desire to keep conflict agonistically "open," it speaks also to the desire to close this conflict not simply by troubling the traditional moral and legal sanctions that prevent the taking of one's own life, but by advocating a final solution that allows one to refigure his or her "relationship to death," by choosing, "death at the proper time, with a clear head and joyfulness, consummated in the midst of children and witnesses, so that an actual leavetaking is possible while he who is leaving is still there" (Connolly 164). Supporting this argument, William Connolly argues that this new death-ethics not only allows the individual to choose the time of his or her death, but also allows the individual the freedom "to cultivate an identity that can sustain itself without seeking to conquer, convert, marginalize, despise, or love to the point of suffocation every identity that differs from it" (164-165). What Connolly does not account for, however, is that the oppression of the "other against which [the dominant] identity may define itself" (x), might find just one more avenue for eliminating or disposing of those whose radical difference does not conform to the norm.

Unfortunately, within this scenario of liberal possibilities, "the tragedy of Tracy" is seen in relation to the consequential "agony for [Latimer] and his family." Tracy herself remains invisible: she is not seen as a person; she is seen through her disability. Her disability becomes who she is. In a similar way to Rodriguez, she stands as an iconic reminder of the modern need to eradicate the horror of pain, dependence, and incapacity.

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a number which determines the order in which the bills may be introduced—Francine Lalonde, who was given number 248, will not have this opportunity for quite some time.

In this way, both Tracy Latimer and Sue Rodriguez offer an ironic map to salvation: the choice either to choose death or to be chosen. This is problematic not only because it negates the lives of whole sectors of the population, but also because it sets as a precedent models of behaviour most suitable to the constructive elimination of aged, ill or disabled individuals.

The premise that an individual is better off dead than disabled can be challenged, however, by exposing and disturbing the "pervasive set of negative messages, values and conditions" that shape how we see people with disabilities, and by calling into question terms such as quality of life and the taken-for-granted, but contradictory, affirmations of equality and difference. By creating what Michel Foucault calls a "reverse-discourse"—a discourse that "[speaks] on its own behalf, to demand its own legitimacy or 'naturality' be acknowledged" (*History of Sexuality* 101)—it might be possible, as Kirkham suggests, to (re)tell Tracy's story as a "survivor" and as a "fighter" (*Her Majesty the Queen and Robert Latimer* 1994 353); it might also be possible through listening to the stories about and by people with disabilities to imagine a different "way of being," a different way of knowing oneself and a different way of knowing others, not through the exercise of power and domination, not through an allegiance to corporate demands for a certain type of person and a certain type of body, but through a recognition that one is always in the process not of fixing meaning, but keeping it in play, and always in the process of relating to oneself and to one another.

Conclusion

Although the Canadian medical association and the law in Canada have resisted the legalization of both abortion and physician-assisted suicide, fearing harmful consequences to society at large, there is a general consensus that while abortion is now "technically" legal, the practice of physician-assisted suicide occurs illegally on a regular basis largely untroubled by accusations of murder and any significant legal consequences. While Henry Morgentaler's fight to legalize abortion illustrates the power of traditional authority, of doctors who argue for their right as doctors to "manage" death, albeit illegally, this fight also points to the attempt, increasing in the twenty-first century, to bypass the medical profession and the law shifting the responsibility for these practices away from the physician to a "new cadre of specialized" practitioners, proficient in the management of death. While this would seem to emphasize the role of "technicians," it also alludes to the increasing ethical and moral authority accorded philosophers, bioethicists, and, as the Sue Rodriguez and the Robert Latimer cases illustrate, individuals themselves.

In some ways, the debate about assisted-suicide and euthanasia is centred around questions of agency—who chooses and who must be chosen for—that are deeply rooted in the social nexus of already existing power relations and institutional authority. However, to leave the debate at this level is to forget that these existing power relations, and the resulting discourses and practices become part of a persuasive "master narrative" that allows Canadians to find a comfortable and moral sense of themselves. Because, as

Alasdair MacIntyre points out, individuals create their sense of what and who matters by referring consciously or unconsciously to the stories they have learned and internalised, simply drawing attention to who has agency and who does not have agency does not solve the problem of how and why authoritative agency in these matters is increasingly being delegated to the individual who, as an authoritative family or community member, can decide, in a utilitarian way, "what is best for all concerned" (Hardwig 105). It also does not take into account how these "deathmaking" practices are reconfigured in the Canadian national imagination in a way that allows Canadians to maintain a constitutional vision of themselves as a democratic, fair and equitable nation, concerned with promoting the liberty of all its citizens (Fulford 32).

By reconstituting these practices in relation to a citizenship envisioned in dichotomous relationship with those who might be termed "non-citizens," a divided national consciousness is perpetuated, moulded to view able bodied and disabled persons in hierarchical relationship to one another. This view is oppressive in that policies, practices, interventions, and laws that negate people with disabilities are justified and rationalized by the able-bodied perspective that views disability as personal tragedy. Within this paternalistic zeitgeist, people with disabilities are viewed as a moral obligation: figured as "damaged" or "impaired," they must, as Henri Stiker emphasizes, be "repair[ed], re-establish[ed] or restore[d]," reintegrated or rehabilitated into the folds of "normal" society (124). Individuals, institutions, and the state not only have a collective responsibility to compensate these non-normative individuals for their impairments, but they have a responsibility to *assist* them to return to the "normal" workforce. If this rehabilitation program fails or, increasingly, under a corporate capitalist

mentality, it is considered too "costly," then the notion that the disabled constitute an "insufficiency to be made good" is replaced by the image of them as a "deficiency to eradicate" (124).

In this scenario, the liberal, pluralist validation of difference is paradoxically replaced by a desire to assimilate all citizens into an equal, normative ideological whole. As Henri Stiker elaborates, this assimilation "marks the appearance of a culture" that at the same time as it affirms difference, paradoxically effaces difference, making ordinary the concept of exceptionality, and making the same, the concept of the other (128). In effecting this change of perspective, modernity has "complete[d] the act of identification" by "making identical" all those who embody difference, paradoxically creating a society "that is less and less pluralist, [and] more and more rigid" (128).[1] In a social system whose desire to make equal is synonymous with the desire to efface difference, state, institutional, and individual responsibility is geared to controlling, monitoring, and supporting individuals in their desire to return to the norm[2] at the same time as it provides

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[1] This erasure of difference can be seen, paradoxically, in the move to accept and welcome homosexual identities into the normative hegemonic fold. As long as these radical "other" identities can either pass as heterosexuals or embody the values and norms of the dominant society, they are considered acceptable. Although this acceptance is far from being fixed as a norm, I think it is safe to make the assumption that, at least hypothetically speaking, the lesbian couple who desire a family and children are far more acceptable than the lesbian couple who flout hegemonic conventions, attend gay parades and refuse the notion that it is "natural" for women to want to have children. Similarly, I think there is an increasing acceptance of gay men, who are willing to sacrifice the stereotypical view of them as promiscuous, for a monogamous embracing of standard family values. For example, in the HBO series, *Six Feet Under,* David Fisher and Keith's gay sexuality is acceptable because they are willing to sacrifice promiscuity for family obligation and committed relationship. Not only do they give up the "gay" lifestyle, but they struggle to establish a "normal" family, adopting and "saving" two African-American boys from their lower class fate. The show ends by affirming their success both as parents and as a couple; they grow old together, surrounded by a loving family who accepts them for "who they are," and when Keith dies an untimely "tragic" death, David's death is portrayed as a romantic and welcome reunion in eternity with the love of his life.

[2] Speaking about the "trend" to normalize identity, Henri Stiker argues that "the demand to be 'like the others' has been, in the most deceptive of ways, so managed by legislation and the institutions that the cry will soon be heard, 'We're disabled too!'" (132). Ironically, this is seen to be a distinct problem with the *Americans with Disabilities Act (ADA)*, whose affirmation of the rights of persons with disabilities is creating a problem in the courts for this very reason. An assessment of ADA legislation could, then, shed

the social, if not the legal, support for those who might choose or be chosen, given their inability to become "normal," to die.

Supporting the effacement of these non-normal individuals, the practices of abortion, assisted-suicide and euthanasia can be seen as a reasonable solution for an obviously tragic life. Completing the move to normalize or make "equal" the general population, this final erasure of a radical non-ordinary, non-rehabilitative difference in the name of liberty and freedom, is presented as an individual right, and a choice that radical, non-rehabilitative, non-normative individuals *should* make. This view is responsible for the abortion of impaired foetuses (and in Morgentaler's case, for the abortion of able-bodied foetuses who, because they come from single parents or poor families, may grow up to lead immoral and socially-unacceptable lives), and for the argument that the terminally ill, aged, or physically or cognitively disabled individuals should not be allowed to live. Compounded by the neoliberal, corporate capitalist context, which frames and gives this new life-and-death ethic additional meaning, a traditional focus on rationalism, now framed by a focus on capitalism, means that disability becomes the new "boundary category" of acceptable personhood and citizenship (Oliver 40).

Presented, in a moral sense, as a desire to alleviate pain and suffering, the choice to die becomes not simply, in abstract terms, a way of managing life and death, but, in the realm of real-life praxis, a way of negotiating rationally the relative value of human beings. The extent to which doctors, lawyers, judges, technicians, bioethicists, and fathers on farms are granted the power to judge, to legitimate, delegitimate, and, increasingly, to

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new light on Stiker's assessment, that "the problem of our society is not a failure to integrate but of integrating too well, integrating in such a way that identicalness reigns" (132).

kill, is the extent to which minority individuals who do not conform to the able-bodied, able-minded norm are encouraged to opt for or submit to the choice to die. In this respect, the increasingly popular belief in the "good" death, seen by many in the Right to Die movement as a natural extension of the "good" life, takes on new dimensions when considered to be not only a matter of personal choice, but a "requirement" for those who suffer or burden the "good" lives of others.

To argue, however, that this view of ability and disability is constructed, begs the question as to how and why this construction happens. While my analysis posits that this construction happens first and foremost in law, it also, on a more essential level, happens in the well-ordered and well-crafted fictions and rhetoric that shape our relationship to the neoliberal democratic order and the way we see and understand the world and each other in it. As Alasdair MacIntyre argues, there is no way of providing "an understanding of any society, including our own, except through the stock of stories which constitute its initial dramatic resources" (qtd in Fulford 33).

Hayden White reiterates this idea, when he states that there is no easy or clear separation between narrative and the culture that human beings construct. The natural impulse that human beings have to narrate inevitably colours "any report of the way things really [happen]" (5), and this narration is informed by the ethos of our time. The narration of a "real" event resolves any "problem of how to translate *knowing* into *telling*" by "fashioning human experience into a form assimiable to structures of meaning that are generally human" (5), providing human beings with a vehicle for transmitting and understanding the nature of their "shared reality" (6).

From this perspective, narratives, stories and myths[3] function as synonyms for ideology—and specifically from a Canadian context, a liberal, capitalist, and democratic ideology—in that they sustain and legitimate current power relations and promote the interests and values of the dominant group. Speaking of the nature of ideology, Terry Eagleton explains that

> [a] dominant power may legitimate itself by promoting beliefs and values congenial to it; *naturalizing* and *universalising* such beliefs so as to render them self-evident and apparently inevitable; *denigrating* ideas which might challenge it; *excluding* rival forms of thought, perhaps by some unspoken but systematic logic; and *obscuring* social reality in ways convenient to itself. Such 'mystification', as it is commonly known, frequently takes the form of masking or suppressing social conflicts, from which arises the conception of ideology as an imaginary resolution of real contradictions. (5-6)

This definition of ideology is relevant to an understanding of how narration, stories and myths socially construct "real" events in ways that appear "natural." Paralleling and utilizing this ideological mystification, narration supports dominant ideological constructs by endowing these events with cultural and ideological meaning that "[masks] or [suppresses] social conflicts," privileges some forms of knowledge and some individuals over others, and allows them to be framed and "resolved" imaginatively in coherent ways that affirm that which already "is" (6).

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[3] I use the word "myth" more in Roland Barthes' sense of the word, as a fiction, unproven or illusory, that is circulating in contemporary society, affirming ideological "realities," while, at the same time, creating false representations and erroneous beliefs. I also, however, draw on Levi Strauss' notion that myth speaks to our need to know the "truth" of our human condition. In identifying two founding binary oppositions that structure myth—overvalued and undervalued kinship relations; monsters and disability—and speak to our human condition, Strauss works towards a theory that puts the human terrestrial affliation at the centre. This theory not only affirms diversity and multiplicity, within a material, "lived" context, but also problematizes our identification with mind, reason, and the divine.

In short, narration, stories and myths—and, on a more specific level, the use of metaphor, synecdoche, and stereotype—reinforce the ideology of the Canadian capitalist, liberal, and democratic society, which is essentially ableist. The extent to which these myths and stories permeate the quotidian reality, being disseminated by institutions such as medicine, the family, and the media, and being affirmed and reified in law as if they are "real," is the extent to which individuals are blind to the universalising, naturalizing, and taken-for-granted "truths" perpetuated by this ideology, and the narratives within it.

It is the law's ability to utilize stories and myths, encapsulated in the language of "rights and duties," abstract language, generalizations, and specialized terminology, which work, in the face of this legitimating and over-riding institutional power, to make people powerless. These fictions are visible in the interpretation of constitutional law and in the criminal trial, which is essentially organized around storytelling, and focused on who can tell the best, most culturally relevant story about what it means to be human (Bennett and Feldman 3).

From this perspective, the extent to which the Morgentaler, Rodriguez and Latimer cases constitute a critical space in which we may come to know ourselves, is the extent to which they speak also to our collective Canadian national identity. Signifying a conscious or unconscious engagement with a neoliberal-democratic ideology and its relationship to discriminating and oppressive narratives and practices, these cases, and their interpretation in the courts of law and the larger society, contribute to a "new" eugenics' discourse and practice.[4] The significance of this claim lies in the way in which

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[4] My intention in performing this study is not to speculate on or make spectacular the possibility of another genocide, not to perpetuate the myth that eugenics "pits the forces of evil and power against the forces of innocence and vulnerability" (351), but, rather, to explore what ideas, discourses, and cultural practices create an environment where euthanasia, mercy killing and even genocide become permissible.

this discourse or plethora of discourses ignores or refuses dis-abled or non-normative identities. This lack of representation, which can be seen as a precursor to the actual "required" physical death of disabled people, calls into question the liberal and democratic agenda, and prompts a further consideration of the central tenets of these ideologies as they appear in relation to everyday practices and the lives of *all* Canadian peoples.

In exposing these stories and myths as constructed fictions that have a basis in constitutional political purposes, I hope I have revealed that (neo)liberal-democratic agendas, while espousing freedom and equality, paradoxically, negate the freedom and equality of some non-normative people, and people with disabilities, in particular. I hope I have exposed, in short, that if we want to endorse both equality and liberty, in a truly pluralist sense, then we have to acknowledge that at this present time we do, indeed, have the 'wrong' story. As Jerome Bruner points out, "[o]nly when we suspect we have the wrong story do we begin asking how a narrative may structure (or distort) our view of how things really are. And eventually we ask how story, *eo ipso,* shapes our experience of the world" (9), and, I would add, our perspectives of both able-bodied and disabled people who live in the world.

This acknowledgment of story, then, foreshadows the question of resistance: its possibilities and its effectiveness. To return to the questions that I posited in the introduction to this study, we might ask if there is any way that narrative and rhetoric can counter the hegemonic able-bodied and able-minded narrative? Is there any way in which a specific focus on the narratives of, for, and about people with disabilities could challenge the hegemonic narrative that constructs the nation as able-bodied and able-

minded? On a more specific, maybe a more realistic level, is it possible that these narratives might call into question the political construction of ability and disability, as it appears in constitutional and substantive law, and as it is translated into practices, such as abortion, assisted suicide, and euthanasia?

According to Sherene H. Razack, in "The Gaze from the Other Side: Storytelling for Social Change," one possible way of challenging established hegemonic knowledge is to focus on the "stories of members of marginalized groups" that must "reveal things about the world that we *ought* to know" (38). Her specific focus on feminism, which, she argues, must "flood men's narrative story and phenomenology" with a focus on "women's story and phenomenology," is one way of using stories to obtain "the knowledge we need to create a just legal structure" (38). Stories, Razack argues, "bring feeling back into jurisprudence, and [because] they tend to work from experiential understanding," they validate "women's daily lives" and refuse the tendency to negate or silence women's reality (38).

As a model of resistance, this storytelling strategy has relevance to other minority populations, including the aged, the terminally ill, and the physically and cognitively challenged individual. As I implied in the conclusion of the Latimer chapter, it is, I believe, important to tell Tracy's story, and the stories of all people with disabilities. Because the dominant story in the Latimer trials—and in the ensuing media coverage—is one that renders Tracy in a state of passivity, she remains throughout the trial as an absent presence. She enters into the conversation either as an invisible "other" or as an example of a tragic, pain-filled, suffering "bundle of needs." Retelling Tracy's story, then, is important because it has the potential to trouble the stereotypes and the stereotypical

visual and narrative constructions that are disseminated first in the law courts and then in the media.

For example, a focus on the role of the way in which the disability-rights coalition interveners used Tracy's school communication book as evidence of her ability, rather than her disability, could show how ordinary stories based on concrete experience can intervene in and trouble the hegemonic project of "normalizing" ability. These stories, which portray Tracy as a "very happy girl," a girl who enjoyed "picking the snowflakes off her picture," who was "all smiles," who enjoyed trips out with her family and socializing with them around the bonfire, run contrary to the stories that Brayford told the jury about Tracy. As such, these stories challenge and disrupt the stories told by Brayford in the courtroom. Ironically, they constitute not a claim to difference, but a claim to "sameness": Tracy was no different than any other happy schoolgirl. In disturbing what became the dominant story, this story performs the necessary political action of expelling, as Chantal Mouffe suggests, all claims to truth, including the claim that disability is a tragedy and the taken-for-granted claim concerning the primacy of rational and able-bodied subjectivity.

Having said this, there is a danger in telling the stories of those who do not or cannot write or speak, in that the person who is being written about, the "model" in Phillipe Lejeune's terms, will be reduced to the state of the "source" (207). In this way, Tracy Latimer and Sue Rodriguez tell us everything "we" need to know about disability: they stand for all people with disabilities and the pain and suffering that they experience. Rodriguez' determination to die, to be rid of her disabled body and her "profound psychological pain" in Lisa Hobbs-Birnie's words, transformed her "into a powerful

warrior" (6). Similarly, Mark Brayford's comments that Tracy was "totally dependent upon others," that she was "going to be a comatose" because not even the "miracles of modern medicine" could help her (*Her Majesty the Queen and Robert Latimer* 367), and that "Bob Latimer acted out of a sense of responsibility, did what he felt was right, did what he felt was necessary" affirms not only the belief that people with disabilities are "better off dead" (363), but that fathers have a right to kill them. In this real-life scenario, dominant power relations are reproduced and the relationship of the dis-abled and the able-bodied is characterized by deprivation and, as in the stories told about Tracy by Robert and Laura Latimer in court, by the notion of possession. This dynamic raises questions of the larger cultural and socio-economic responsibility towards people with disabilities. It illustrates how relations of domination interfere with and ground the interpretation, legitimating and distributing it for common consumption by presenting as fact what is undoubtedly based in fiction.[5]

How these stories of people with disabilities are received, then, will depend upon the ability of those who are telling the story to frame the story in a way that it can be heard. In other words, it is not enough just to tell the story. One has to be aware, as Foucault emphasizes, of the way in which these stories are always heard in a relation of power, and in relation to hegemonic relations of power. These relations of power may well be "always local and unstable," tense and unequal, but it is telling that the central frame of war "pursued by other means" as politics has as its goal, the desire to affirm the normative, able-bodied and able-minded experience, while leaving as prosthetic the experience of disability (*History of Sexuality* 93).

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[5] It is no accident that one of Brayford's strategies was to repeatedly tell the jurors that he was simply going to give them the "facts" of the case.

To return to the possibilities of using narrative as a form of resistance, as a tactic that disturbs the able-bodied representation of people with disabilities as inferior, as "better off dead," it is not an exaggeration to say that effecting a political visibility of disability and its relation to hegemonic and narrative structures is no small task.[6] While stories might well humanize us, emphasizing our "differences in ways that can ultimately bring us closer together," allowing us "to see how the world looks from behind someone else's spectacles" (Delgado 2440), they can also be used by those in power to oppress and negate minority non-normative subjectivities. Indeed, as in the Rodriguez case, they can persuade us to tell our own stories about ourselves in ways that negate our own lives in the telling. Undoubtedly, however, stories do play a prominent role in "worldmaking," in the "making of actual worlds" (Goodman 102), and in doing this, they have the potential to take us beyond, as Henri Stiker emphasizes, narratives of integration and rehabilitation, and narratives of delegitimation and elimination.

Because disability occupies a marginal position in mainstream culture and literature it has the potential to trouble the "normative universe." Putting disability at the centre disturbs comfortable and fixed assurances about our shared humanity, and calls into question dominant, taken as fact, beliefs about our culture, and about Canada's

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[6] Autobiography has been presented as an effective tool in this respect. However, autobiography's potential for challenging hegemonic able-bodied discourse, while serving to "deflect the gaze from a body that might otherwise trigger stereotypical responses," is challenged by the tendency to reduce the autobiographical subject to a "case study." In making this assumption, the individual becomes "case material" that is subjected to analysis, and is often read as an exemplar or paradigm for the role that disabled people are expected to play in society. In other words, there is a danger that these narratives will, instead of challenging hegemonic discourses, become an example of what is taken to be the "norm." Read in this way, autobiography has the potential to reify disability and the disabled person, reinforcing his or her marginalization (Couser 182). Narratives of recovery are typical of this type of autobiography. Ruth Cameron's *Journey into Personhood* and the late, Christopher Reeves' *Still Me* are autobiographies that fall into this genre, while Christopher Nolan's *Dam-Burst of Dreams* and Ruth Seinkewicz-Mercer's *I Raise My Eyes to Say Yes* offer possibilities of resistance.

representation of itself as a liberal, tolerant, pluralist country. In disturbing received notions of institutional narratives and practices, such as those practices of euthanasia and assisted-suicide explored in this project, a disability perspective makes visible a cultural imaginary based on the exclusion and the elimination of undesirable subjectivities. From a disability perspective, death is not a solution to a life that from the hegemonic perspective is not well lived.

Because disability, like race, queer studies, and gender studies, has the potential of providing a powerful critique of what Robert Cover calls the "normative universe," more work must be done in this area.[7] Reading real-life cases, the media, and literature from a disability and cultural studies perspective is, I would argue an essential project for the humanities: a project that is still, in David T. Mitchell and Sharon Snyder's terms, in need of being "render[ed] sensible" (178).

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[7] Another strategy, from a disability studies perspective, is to foreground in academic writing, in courses offered at the high school, college and university level writings for, about, and by people with disabilities, recognizing the disability culture as a distinct culture and human rights movement in and of itself, while also acknowledging the connections and interface with other academic areas, such as post-colonialism, gender studies, feminist studies, masculinity studies, and sexuality.

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